American Bar Association Journal

September, 1957

This Month's Cover

On this month's cover, we honor John Adams (1735-1826), lawyer, statesman, and patriot, one of the leaders of the American Revolution, second President of the United States. John Adams typified the best of the legal profession, no act of his career demonstrating it more than his defense of the British soldiers charged with murder as a result of the Boston Massacre of 1770. One of the leaders of the opposition to the Stamp Act, he nevertheless accepted the unpopular side of this case without hesitation and managed to secure an acquittal of most of the defendants. The sketch of John Adams is by Charles W. Moser, of Chicago.

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Vol. 43, No. 9. Changes of address must reach the JOURNAL office five weeks in advance of the next issue date. Be sure to give both old and new addresses.

The President's Page

Charles S. Rhyne

From the call to order in the Grand Ballroom of the Waldorf Astoria until the final gavel fell in historic Guildhall, the New York-London meeting of the American Bar Association was a most historic occasion. Many volumes can (and undoubtedly will) be written to describe the outstanding events which were crowded into July 14 through July 31.

The lawyers of New York provided entertainment such as only that great city can offer. Shows, sightseeing and the joint dinner of the judiciary and the Association were among the highlights. The unique convocation in the United Nations Building gave the meeting an international flavor which carried through to the end. Section meetings, Assembly meetings and sessions of the House of Delegates all seemed to have a unique character of expectancy due to the recessing of so many phases of their sessions to London.

The greatest exodus from New York came on July 17 when most of the members of the House of Delegates and their wives boarded the *Queen Mary* for Southampton. The crossing was destined to live long in the memory of those aboard that great ship. On the first night out, in answer to an SOS, the *Queen Mary* took aboard four men injured by an explosion in a U. S. Naval vessel. Most of the 1970 passengers watched this grand rescue operation (many of them hanging out of portholes or over the side until the wee hours of the morning). It was a thrilling sight to witness one of the greatest ships afloat respond so quickly and efficiently to this call for help. This mission of mercy caused a seven and one-half hour delay, which, however, was largely made up and the *Queen Mary* docked in Southampton only two hours late for the voyage.

To put in a few words the momentous events in London is an impossibility. The opening in Westminster Hall was an event which none present will ever forget. The addresses by the Lord Chancellor, the Attorney General and the President of the Law Society of England were a most fitting beginning to a week of historic significance. The warmth of their welcome was most heartwarming. The responses by the Chief Justice of the United States, Attorney General Brownell and President Maxwell were equally inspiring and most well received. From that moment on until the final addresses in Guildhall, there was a week of inspiration, information, law and entertainment unsurpassed in the annals of our Association.

Much was said about the common bonds which inextricably intertwine England and the United States. Many speakers paid their respects to our common speech, our common blood, our common law and our common governmental institutions. Throughout our visit emphasis was placed upon the fact that we of America have our taproot in the traditions, history, customs and literature as well as the legal principles and governmental institutions of England. Many were the references to the fact that this "invasion" by American lawyers constituted the greatest invasion of Britain since the Norman Conquest. And all expressed the earnest hope that the invasion would be equally successful since its only purpose was to renew and strengthen the ties of affection and friendship between our peoples.

The joint meetings of the English and American lawyers to discuss comparative negligence, publicizing court trials, probate law and practice, and jury trial were all of tremendous informational value and were extremely well attended. The entertainment was the most lavish and extensive ever experienced. There were as many as thirty separate social events on many evenings. The Garden Party given by Her Majesty the Queen was the highlight for everyone. And the great address by Sir Winston Churchill at the Guildhall dinner was an important event we will cherish always.

The dedication of the monument commemorating Magna Charta will live long in the memories of those who were privileged to take part or be present. It is hoped that this beautiful monument will become a shrine to freedom under law as well as a place of interest to all who visit England.

The Prime Minister's address was one of the greatest ever delivered. This great man made a tremendous impression on us all.

The Inns of Court dinners were unforgettable occasions for the ap-

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Views of Our Readers

▪ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.

He Thinks Planning Can Be Palatable

I believe that a comment by William F. Schultz, Jr., in the June, 1957, JOURNAL (page 535) deserves some refutation. In his review of *Municipal Corporation Law* by Chester J. Antieu, he states that ". . . planning by its very nature is unpalatable to Americans. . . ."

As a city planner and lawyer I have had the opportunity during recent months to receive the urgent requests for local planning assistance from people throughout Kentucky. Continuously we are in the position of telling delegations from small, highly independent Kentucky communities that their requests for state planning assistance cannot at this time be met.

Unpalatable or not it seems that these requests for planning assistance exist outside Kentucky too.

To my mind two factors have contributed to this attitude—The Federal Government's (Housing and Home Finance Agency) policy of insisting that new federal, housing and development investments be protected by community planning—the notion that community planning helps attract industry.

Whatever the reasons are, it is important that we realize Mr. Schultz's statement goes too far.

ISIDORE S. SUSSNA
Frankfort, Kentucky

A "Positive" Approach to Public Relations

I must take this opportunity to let you know how much I enjoy reading the AMERICAN BAR ASSOCIATION JOURNAL. The JOURNAL brings all the activities into my life that I am too busy, as a young attorney, to find time to attend. So through the JOURNAL I get the vicarious pleasure of being "there".

There is one area of coverage that the galaxy of legal and professional publications including the AMERICAN BAR ASSOCIATION JOURNAL fails to cover. That area is "The Positive Approach to Good Public Relations". Yes, the JOURNAL, I feel, should cover this area. The lay public every day reads where one bar group or another is enacting or speaking on "negative" measures, such as censuring attorneys for breaches of ethics.

If that is all, or most of what the lay public reads about lawyers, although it shows that "we" want a clean house, it also carries a self-condemning implication that most lawyers are wicked and unethical.

So please, at some time or another, report something about the "positive" approach to charming the lay public. The people who read the JOURNAL while waiting in my waiting room read too much of our self-policing and not enough of what is good about lawyers.

EDWARD D. ROSENBERG
Chicago, Illinois

Kudos for Judge Macelwane

Loud and substantial kudos to Judge Geraldine F. Macelwane for her perceptive article on "The Traffic Court" in the April, 1957, issue of the JOURNAL.

Here is no ordinary legalistic essay. It seems to me the judge's approach is frankly unusual in that she sees the traffic court not as an instrument for determining guilt and meting out punishment, but as an opportunity. She frankly states that the most important duty is to re-educate the traffic law violator to change his attitude toward law enforcement from one of hostility to one of understanding and acceptance.

She sees the unwisdom of rotation of judges and of allowing politics to enter into the court, even to the point of advocating adoption of the Missouri or American Bar Association Plan for selection of judges.

She sees the court not as a mechanical device for meting out punishment, not merely as an agency for administering justice, but as primarily concerned with the court's functioning so that it may take full advantage of its opportunity to help solve a serious problem by helping those who create the problem to change their attitude toward it.

PAUL W. ALEXANDER
Court of Common Pleas
Lucas County, Ohio

We're Against Sin, Too

If your editorial retort to criticism of *The Christian Century* was intended to provoke comment, you have succeeded with this writer. However, it is no answer to that publication's criticism aimed at seeking more effort at remedying court congestion to counter that if that publication: ". . . had done more in their field—if they had been more diligent—they could and should, by this time have abolished sin".

Until such time as the individual and collective members of the legal profession do *all* that can be done to eradicate any legal problem, we must bear the criticism for not doing so. It is no answer to protest good works, blame others, or dis-

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American Bar Association Journal

the official organ of the American Bar Association

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral and Natural Resources Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Insurance, Negligence and Compensation Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral and Natural Resources Law, $5.00; Municipal Law, $3.00; Patent, Trademark and Copyright Law, $5.00; Public Utility Law, $3.00; Real Property, Probate and Trust Law, $5.00; Taxation, $6.00.

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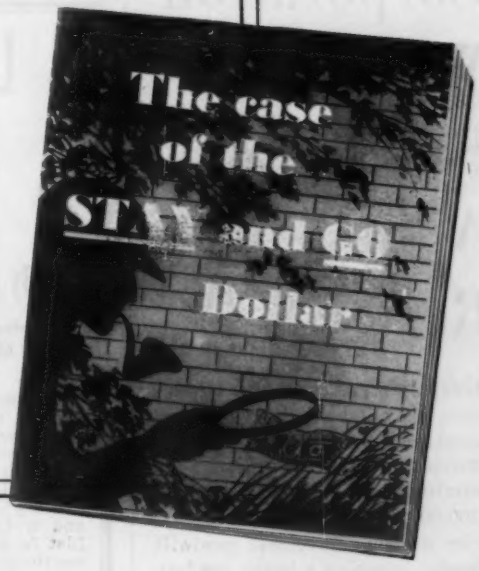

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parage by arguing "ad hominem". If you must defend, let us have a better defense than fun poking, which violates good logic.

This is not the "best of all possible worlds". Consider yourself chastised, sir.

PAUL G. FARGO

Chicago, Illinois

Social Security and Its Reserve

Commenting on the above article written by John Regan Stark of the Virginia Bar, I wish to congratulate him on his excellent explanation of the Social Security law. The article is clear and concise and serves the evident purpose of explanation of the law, as it is now being administered. However, I would have been better pleased if he had given a little more attention to the economic aspects of the administration of the law, which he touches very lightly, although that may be considered beyond the scope of his article.

From the beginning and even now more funds are being collected to the detriment of young people than are necessary for disbursement in benefits. This excess collection of Social Security tax came along during the depression period in the 1930s and thus tended to prolong and deepen the depression as far as revival of business and increase of employment was concerned.

Mr. Stark mentions this at the bottom of page 321 as follows:

> It does, however, represent a considerable cost item to the system, which must be met out of future contributions. Looking at it another way, the older folks get a "free ride" at the expense of younger employees.

Also he lightly passes the economic soundness of this method of administering the law on page 320 as follows:

> In order to meet the cost of future benefits, two alternatives are available: to set contribution rates so that income each year will just about equal benefit costs; or to set tax rates so as to accumulate reserves in the early years of the program so that the interest on this reserve will help to pay the cost of benefits in later years. Congress, so far, has favored the reserve method of accumulation.

He explains, very satisfactorily, why the reserve now being built up must be invested in U. S. Government obligations.

But it is difficult for me to see any advantage in accumulating a reserve, which he says is now approximately $25 billion and by 1980 will reach $70 billion, when the interest on this reserve invested in U. S. Government bonds is paid by the Government itself. This extra interest passing into the reserve, upon which the Government pays to itself interest, would be reinvested in more Government bonds upon which to pay more interest. It thus creates a Frankenstein monster. This reserve monster is fed by taxation of business because the word, employee, connotes business. It is generally understood that excessive taxation is

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BETTER THINGS FOR BETTER LIVING . . . THROUGH CHEMISTRY

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a detriment to business and to employment and is one of the principal causes of inflation which we are now experiencing. Of course this excess reserve, collected under the guise of social betterment of employees, gives the government a large fund for bureaucratic expenditure. The net result of the law would be the same when the youngest employee at the inception of the law reaches the age of 65, about 1983, whether a reserve is accumulated or whether pay-as-we-go procedure is adopted. The obligation is no bigger than the number of employees annually reaching the age 65.

If I am wrong in my analysis of the economic administration of the Social Security Law, I would be pleased to have Mr. Stark, or someone else, correct me.

ROY W. LEWIS
St. Clairsville, Ohio

More on Social Security

The article on Social Security by John Regan Stark in the April, 1957, number of the JOURNAL discusses some good questions. Mr. Stark begins most appropriately with a quotation from William Shakespeare, who originated the most controversial word in the Social Security Act —"employment"—during the theatrical season of 1594-95.

Mr. Stark would emphasize the use of the word "insurance" in the OASI program as having considerable legal significance and tending to bind Congress contractually to the OASI taxpayers. Actually, however, the word "insurance" was injected into the text of the statute by the drafters of the 1939 Amendments at the same time that they were making drastic departures from so-called "insurance" principles.

With apparent reference to the rights of potential claimants, Mr. Stark says that "the only decreases to date have involved certain 'windfall' eligibility or benefit situations which are so atypical as to cast doubt upon their precedent value" (page 321). This is somewhat true, but only if the original Social Security Act of 1935 is completely excluded from consideration. The 1939 Amendments reduced "the amounts payable in future years to single persons and married men whose wives are under 65". (H. Rep. 728, 76th Cong., 1st Sess., page 117.) The weighted benefit formula of the 1939 Amendments favored the lower-wage earners at the expense of the higher brackets. These were not features of the original "contract" which Mr. Stark implies between the Federal Government and certain taxpayers, past, present and future. There have been other changes by later Congresses, adversely affecting both potential entitlement and deduction matters. The 1950 Amendments, for instance, disqualified for potential

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monthly benefits at age 65 some parents who might otherwise have become eligible after August, 1950.

Mr. Stark speculates that Congress "probably could not reduce" general benefit rates "retroactively". He would not, however, presumably contend that fraudulent representations, clerical errors, adjudicative errors, etc., on individual claims are not presently a valid basis for the SSA to reopen individual claims on its own initiative. Congress has indicated in Section 204 (a) that there can be overpayments on claims, which must be reopened and adjusted by the SSA. The Commissioner has prescribed by regulation certain restrictions upon the unlimited reopening of claims adversely to a claimant. Title 20, CFR, Chap. III, Part 403, Subpart G, Appendix, Reopening of Determinations and Decisions. 14 F.R. 6496, October 25, 1949, especially the second sentence in paragraph (4) regarding deductions where no finding has been made "that a deduction is not to be imposed. . . ." It would seem an intolerable situation if all claimants were forever at the mercy of every change in the Commissioner's policy and if every such change might be given retroactive effect. Not all beneficiaries could take advantage of the relief afforded by Section 204 (b). Yet these regulations are subject to future revocation by the Commissioner at any time, if, indeed they have not already become of doubtful validity as the result of *Hobby* v. *Hodges*, 215 F. 2d 754 (10th Cir. 1954).

We would leave open the issue as to whether Congress, in certain limited situations, by new coverage exclusions, etc., has not already reduced certain benefits retroactively. We would insist, however, that if, at some future time, a group of beneficiaries should be able to devise a kind of "legal swindle" upon the OASI program, drawing benefits legally but under grossly inequitable circumstances through one of the

law's many loopholes, Congress might find it necessary to legislate with retroactive effect to recover back payments. Congress would have the power to do so, just as it has the power to tax retroactively.

ELMER F. WOLLENBERG
Portland, Oregon

The Warsaw Treaty— Some Further Observations

Apropos of the article by Clifford Gardner in the May issue of the JOURNAL entitled "Some Legal Advice: So You're Going To Fly to London", the undersigned who was Secretary to the American Section of CITEJA (International Technical Committee of Air Law Experts) in 1946-1947, and an adviser on the United States Delegation to the PICAO First Annual Assembly in Montreal in 1946, has had occasion to examine and study the background documents relating to the Warsaw Convention, and would like to make some observations which may throw more light on the subject and correct possible misleading impressions from some of the comments in the article.

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, which is the title of the treaty, the word "convention" meaning treaty in this instance, *not* an organization, was signed at Warsaw October 12, 1929, at the conclusion of the Second International Conference on Private Air Law. The conference was primarily a conference of European states at which the only common law country represented was Great Britain. The provisions of the convention were to a great extent modeled along the lines of the railway transport conventions concluded at Berne in 1924. They represented a compromise between the view on the part of some delegations that the air carriers should be held absolutely liable for death or injury to passengers, and the view of others that the carriers should be permitted the usual defenses of reasonable care, contributory negligence,

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The President's Annual Address:

The Public View of the Legal Profession

by David F. Maxwell · *President of the American Bar Association (1956-1957)*

The Association's By-laws require the President of the Association to deliver an annual address before a joint session of the Assembly and House of Delegates "upon such topic as he may select with the approval of the Board of Governors". President Maxwell's address, "The Public View of the Legal Profession", was delivered at New York on July 15.

May I first express my great debt of gratitude to you for affording me the opportunity of being of service to the legal profession during the past eleven months. It has proved to be the most rewarding experience of my life. As I traveled the length and breadth of this nation carrying the message of the organized Bar, I found abundant proof of what I had always believed—that lawyers are everywhere dedicated to the public interest. There is not a city, town or hamlet of this country where lawyers are not the leaders of political and civic activities, giving unselfishly of their time, effort and money to promote the general welfare.

Yet these good works performed so generally are all too often obscured in the public eye by the contumacious conduct of an infinitesimal number of our profession who persist in flouting our Canons of Ethics. Unless these ethics-busters are promptly brought to book, great discredit will be reflected upon all lawyers and the public view of the legal profession will become grossly distorted.

In recent months there has been a grist of articles appearing in magazines of national circulation condemning the profession for its alleged failure to clean its own house. These criticisms stem from the fact that the law is essentially a monopoly within the profession's own control, and the public is demanding that the profession exact of its own compliance with high standards of judicial and legal ethics.

The organized Bar, in collaboration with the courts, attempts to fulfill the public's expectations by, first, formulating and applying high standards for admission to practice and, secondly, by establishing and enforcing Canons of Ethics after admission. It is to our activities in these fields that I would direct your attention today, particularly to some of the problems which have arisen between the Bar and the courts in their joint efforts to perform these functions.

Control over admission to practice is one of the hallmarks of the profession and properly so, because the active practitioners of the Bar, by reason of their experience, can best determine the educational standards necessary to equip a student adequately for the practice of law. This function the organized Bar has performed through state bar examiners who prescribe the examinations upon which admission to practice is based. It is important that they be comprehensive and exacting for they are the basis for a certification by the court that the successful applicant is qualified as a lawyer to serve his clients, the community, the public and the court itself.

Ascertaining by examination that the applicant has an adequate knowledge of the law is therefore an important element of the admission process. That this testing is not a perfunctory ritual can be demonstrated by examining the results of Bar examinations of any of the states. For example, figures published by the State Bar of California show that of the 832 applicants who took the examination in the fall of 1956 only 432 or 52 per cent passed. The percentage of those who passed the California bar exams in the last twenty years is about 47 per cent. Other states show a similar pattern of rigorous grading. While it is usually possible

to take the examination again, the California statistics indicate that only about 23 per cent of those taking it the second time will succeed and only 11 or 12 per cent will pass of those who take it more than twice. These statistics make it abundantly clear that admission to the Bar is obtained only by those who have established superior ability in rigorous competitive examination. Equally important, it should be noted, is that a substantial percentage of those who have completed the required course of preliminary training and have otherwise qualified to take the examination will not be admitted to the profession. Their investment of time and money has not given them the right to attempt to earn a living in their chosen profession. Thus it is evident that the Bar and the courts have pursued a selective process designed to insure the academic proficiency of the profession. This sets the lawyer apart not only from persons in other occupations but also from individuals who have had similar training but who have failed to meet the standards.

Good Moral Character . . . *A Second Requirement*

However, demonstration of a knowledge of the law and an ability to interpret legal concepts is only one of the requirements of admission to practice. A second condition and one which antedates the first requires the applicant to convince the examiners that he is possessed of good moral character. Rigorous Bar examinations are a fairly recent development but proof of a good moral character has always been a prerequisite of admission to practice. All states have a system through which sufficient information is obtained to satisfy the Bar examiners as to the good character of the applicant. In addition, the National Conference of Bar Examiners maintains a service which enables the committee in one state to ascertain the standing and reputation of a lawyer who chooses to transfer to another state. Certainly no argument is needed to justify this practice.

While statistics on the failure of applicants to pass the character test are not as readily available as those for the scholarship examinations, it is clear that a significant number of applicants are denied admission because of their failure to satisfy the examiners as to their moral character. Here as in the case of those who failed the scholarship examinations there will be men who have spent many years and large sums of money in training only to find themselves barred from becoming lawyers.

Of course, the power thus vested in the organized Bar must not be arbitrarily exercised to exclude worthy candidates. Hence it is appropriate that the applicant be afforded the right of re-examination and of appeal. Such safeguards are necessary for the protection of the individual but they must be invoked without defeating the basic purpose of maintaining the legal profession on a high plane for the benefit of the public.

Recent cases of the Supreme Court of the United States have raised fundamental issues as to the rights of state agencies in these areas and are worthy of our attention.

In discussing these decisions, it is not my purpose to impugn the motives of the Court, or to join in the current wave of sometimes hysterical attack which has been directed at it. On the contrary, I deplore the loose and vituperative nature of public statements issued recently condemning the Court. The Court is a fundamental institution of our republican form of government without which the constitutional doctrine of separation of powers would be meaningless. It does not therefore seem fitting, merely because recent decisions may not meet with our complete approval, for lawyers to join in any efforts to dilute the power of the Court which just twenty years ago we fought so zealously to maintain.

However, that does not mean that the decisions of the Court must be regarded as sacrosanct. On the contrary, it is just as much a part of our democratic process that the Court's decisions be subjected to a constructive critical review as it is for enactments of our legislature or pronouncements of our executive to have focused upon them the light of public opinion. But, the emphasis should be on the constructiveness of the criticism. It should not be intemperate or interlaced with personal abuse of members of the Court, because unbridled ranting could very well result in undermining public confidence in the Court as an effective and integral part of our government. It does not seem too rash to say that if the Supreme Court loses public respect as the result of such uncontrolled attacks, it may carry with it the reputation of all of the lesser courts of the country and thereby cause serious damage to our whole system of jurisprudence.

It is, therefore, in a spirit of fairness, and with what I hope will be considered moderation, that I now point to certain of the effects of the Court's decisions upon the joint efforts of the Bar and the state courts to maintain adequate control over admissions to the profession. I will not attempt to dwell upon the implications of the language in those cases concerning the political character of the Communist Party and the relationship of the First and Fifth Amendments to questions of membership, except insofar as is necessary to evaluate the effect of the decisions upon the scope of inquiry and exercise of judgment of members of boards of bar examiners and state courts.

In the case of *Konigsberg* v. *State Bar of California*, the applicable California law required the committee of bar examiners to certify to the California Supreme Court that the applicant was of good moral character and had not advocated the overthrow of the Government of the United States or California by force, violence or other unconstitutional means. Konigs-

berg at his hearing answered this question categorically in the negative. Nevertheless the state board refused to certify him on the ground that he had declined to answer questions concerning his membership in the Communist Party. The California Supreme Court sustained the Board. Upon appeal the Supreme Court of the United States held that the refusal to admit the applicant was arbitrary and discriminatory and without adequate basis and therefore a violation of the Fourteenth Amendment.

It has always been recognized that an applicant for admission to the Bar must have a deep sense of loyalty to his government. Thus an oath is required by most states, the relevant part of which is usually in approximately the following form:

> I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of . . . .
>
> I will maintain the respect due to Courts of Justice and judicial officers . . . .

Certainly the willingness to uphold the Constitution of the United States and of his own state is no more than consistent with the accepted theory that a lawyer is an officer of the Court, and, as such, has a duty to the public which frequently rises higher than his primary obligation to his client. The Supreme Court of the United States in 1945 upheld the Supreme Court of Illinois in refusing admission to an applicant, otherwise qualified, on the sole ground that he had declined to swear to uphold the state constitution because it required service in the militia in time of war. As a conscientious objector, the applicant had scruples against such service.

By the same token it would seem equally clear that anyone advocating the overthrow of the Government by force and violence can hardly in good faith subscribe to an oath to uphold our Constitution. Hence many states by court decision, and some, including California, by statute, require that as a prerequisite to admission applicants demonstrate that they do not advocate "the overthrow of the Government of the United States or of this state by force, violence, or other unconstitutional means" —to quote the language of the California Code.

David F. Maxwell

Settled Law . . . *An Illinois Case*

In 1954 the Supreme Court of Illinois refused admission to an applicant who refused to answer the inquiries of the Committee on Character and Fitness as to his membership in the Communist Party. The Illinois court held that these inquiries were relevant to a determination of his good citizenship and his ability to take the oath of a lawyer in good conscience. Hence, the court concluded that the applicant's constitutional rights were not infringed by the Board's refusal to certify him. In February of 1955, the Supreme Court of the United States refused to review this decision for want of a substantial federal question.

So, prior to the *Konigsberg* case, lawyers generally had regarded the law on this point as settled. It is true that Konigsberg insisted at his hearing before the Board that he had never, did not then and would never advocate the overthrow of the Government by force and violence. Nevertheless, he refused to answer pertinent questions which would have established the truth of the conclusion he so rigorously asserted, on the ground that such queries were beyond the legitimate scope of the examination. As Justice Harlan pointed out in his minority opinion, it would seem logical to imply the power in the examiners to inquire into the applicant's past activities to the extent necessary to satisfy themselves that he had not in fact embraced the

Communist theory of government. It would seem particularly relevant to determine whether the candidate was a member of the Communist Party since it is well recognized that one of its tenets advocates the overthrow of Government by force and violence. Yet the majority opinion found that to require the candidate to respond to such a question violated his rights under the Fourteenth Amendment.

It is difficult to believe that it was the intent of this decision to handicap the profession in effectively discharging its duty to the public in a case where the applicant upon whom the burden of proof rests refuses to disclose facts necessary for the examiners to know in order to reach an intelligent opinion as to the applicant's fitness for admission.

Yet the language of the majority opinion would seem to imply that to practice law was a right guaranteed under the Constitution as a civil liberty, rather than a privilege, which all of us have been taught to believe all of our lives. For example, the majority opinion states:

> The Committee's action prevents him from earning a living by practicing law. This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer.

But, whether it is a right or a privilege, it has always been deemed to be exclusively within the control of the state to which the application has been directed. Mr. Justice Harlan's dissenting opinion, in which he says:

> . . . this case involves an area of federal-state relations—the right of States to establish and administer standards for admission to their bars—into which this Court should be especially reluctant and slow to enter. Granting that this area of state action is not exempt from federal constitutional limitations, see Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. —, 77 S. Ct. 752, I think that in doing what it does here the Court steps outside its proper role as the final arbiter of such limitations, and acts instead as if it were a super state court of appeals.

This would seem to be much more consistent with the generally accepted views which have controlled the practice of law heretofore.

The *Schware* case to which Justice Harlan alluded might also be interpreted as the exercise of super state powers by the Supreme Court, I believe. In the *Schware* case, the New Mexico Board of Bar Examiners refused to permit the applicant to take the bar examinations on the ground that he had failed to satisfy the Board as to his good moral character. From the facts adduced at Schware's hearing it appeared that he had been a member of the Communist Party from 1932 to 1940, that he had been arrested, although not convicted, because of his participation in labor disputes in 1934, and in 1940 for recruiting persons to fight for the Loyalists in the Spanish Civil War, and that he had used aliases from 1934 to 1937.

It is significant to note that no question of the adequacy of the hearing was raised either in this case or the *Konigsberg* case and procedural due process was apparently conceded.

The decision of the New Mexico Supreme Court upholding the Board was reversed by the Supreme Court of the United States as being an arbitrary and unreasonable exercise of the Board's authority and therefore a violation of the due process clause of the Fourteenth Amendment. While reasonable men might certainly differ as to whether the improper conduct of the applicant occurring so long before the date of his application was sufficient to justify the Board's action in view of his apparent reform and atonement, nevertheless the United States Supreme Court could not have reached the decision of the majority without substituting its judgment of the facts for that of the Supreme Court of New Mexico. This it seems to me brings it within Justice Harlan's admonition in the *Konigsberg* case.

The Organized Bar . . . *A Paramount Interest*

Without question the organized Bar has a genuine and paramount interest which is affected by these decisions. As Mr. Justice Frankfurter stated in the *Schware* case:

> From the thirteenth century to this day, in England the profession itself has determined who should enter it. In the United States the courts exercise ultimate control. But while we have nothing comparable to the Inns of Court, with us too the profession itself, through appropriate committees, has long had a vital interest, as a sifting agency, in determining the fitness, and above all the moral fitness of those who are certified to be entrusted with the fate of clients. With us too the requisite "moral character" has been the historic unquestioned prerequisite of fitness.

It is important it seems to me that the Bar meet the challenge of these cases. Two remedies suggest themselves:

(1) That every precaution be taken by examining boards to afford the applicant a full and fair hearing to avoid the pitfall of the Florida case of *In re Scheiner;* and

(2) That state statutes be amended or rules of court adopted to spell out more specifically the ingredients of good moral character which the applicant must assume the burden of proving.

I now turn from problems of admission to a consideration of some current disciplinary problems. As I mentioned before, there has recently been criticism of the profession for its failure to carry out its obligation to discipline its members in articles in magazines of very wide circulation. To some extent this criticism is valid and the answer to it lies only in greater activity by the respective bar associations in their disciplinary work. But, of course, to the extent that these articles suggest there is little or no effort on the part of the Bar to carry out this responsibility, the articles are in error and mislead-

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A New Look:

The Economics of the Profession

by **Robert M. Segal** • *of the Massachusetts Bar (Boston)*

How many lawyers are there in the United States? How much do Americans spend on legal services? In what parts of the country do lawyers have the highest incomes? Are lawyers' incomes on the increase? These are a few of the questions that Mr. Segal answers in this article, which is a follow-up of earlier articles appearing in the February and March, 1953, issues of the Journal.

I. *Introduction*

"The brutal fact is that the lawyers of the United States have been as indifferent to their own interests as they have been jealous of, and faithful to, the interests of their clients."

The above quotation from the report of the Director of the Survey of the Legal Profession has helped to give a new impetus to studies of the legal profession. The lawyer is once again examining his chosen field, and numerous new articles on the economics of the legal profession are attracting new attention.[1] The two most recent and revealing reports deal with the number of lawyers in the country and their background, and the income of lawyers.[2] From these reports, we now have certain new basic statistics about the legal profession:

1. In 1954, about 1.6 billion dollars, or one half of one per cent of the total national income, directly originated in the legal service industry.

2. Americans as individuals spent slightly more than one billion dollars for legal services, representing an increase of 17 million dollars over 1953 and an increase of 59 million dollars over 1952. This increase did not keep pace with the increase in personal consumption expenditures and the rate of increases for personal expenditures for physicians and dentists.[3]

3. The total number of lawyers in the country in 1955 was 241,514.

4. The expenses of lawyers have risen so that the ratio of net to gross income dropped from 65 to 61 per cent between 1947 and 1954. Payrolls of lawyers were about 52 per cent higher in 1954 than in 1947. Rents and other costs of practice increased even more, from $2230 on the average in 1947 to $3680 in 1954.

5. The median age of all lawyers in 1955 was 45 years.

6. About 190,000 of the lawyers in the country are in private independent law office practice while the rest are primarily salaried lawyers.

7. There is a wide disparity in the income of lawyers, but the net average income for all lawyers in 1954 was $10,220, an increase of 36 per cent over the average of $7530 for 1947. The median income for all lawyers was $7830 in 1954 as compared with $5700 in 1947.[4]

8. The number of lawyers in individual practice declined from 75 per cent in 1947 to 65 per cent in 1954, while the percentage of large partnership firms increased markedly.

9. More lawyers are relying on business clients rather than individ-

1. Approximately 175 separate reports have been written by the 400 members of the "Survey team" for the Survey of the Legal Profession. A number of these reports cover the fifth (Economics of the Legal Profession) of the six major divisions of the Survey. These include six statistical tomes in IBM typed form as well as other reports on file with the American Bar Foundation. See Foreword by Director Smith in Blaustein and Porter, THE AMERICAN LAWYER (1954).

2. The most recent reports on number of lawyers and their background are based on the *Third Statistical Report of Martindale-Hubbell* (1955), prepared for the American Bar Foundation. These supplement the previous reports of Martindale-Hubbell for the Survey of the Legal Profession. For articles based on these earlier reports see Blaustein, "The Legal Profession in the U.S.: A 1952 Statistical Analysis", 38 A.B.A.J. (December, 1952) and 36 A.B.A.J. (May, 1950).

In addition, the new data on incomes is found in Liebenberg, *Income of Lawyers in the Postwar Period*, SURVEY OF CURRENT BUSINESS (December, 1956), pages 26-36. Earlier income studies include Weinfeld, *Income of Lawyers, 1929-48*, SURVEY OF CURRENT BUSINESS (August, 1949), and Segal and Fei, "The Economics of the Legal Profession: An Analysis by States", 39 A.B.A.J. (February, 1953) and 39 A.B.A.J. (March, 1953).

3. See Segal, *A Current Survey: Lawyers in the National Economy*, 42 A.B.A.J. (October, 1956), pages 920-923; Cantrall, "Lawyers Can Take Lessons from Doctors", 38 A.B.A.J. 196 (March, 1952).

4. See footnote 9 below for a definition and explanation of the median.

uals, for in 1954 about one third of the lawyers received more than half of their gross income from business, compared with 29 per cent in 1947.

10. The incomes of lawyers are directly related to clientele, sources of legal income, size of law firm, size of community, location, age and years of practice and type of practice:

(a) Lawyers working exclusively in salaried employment for private industry received, on the average, the highest income recorded with a mean of $13,770, or $3500 above the national average for all lawyers.

(b) Incomes increase as lawyers rely more on business clientele rather than individuals.

(c) Incomes also increase as the size of the law firm increases, for lawyers in firms of nine or more average almost five times the income received by lawyers in solo practice.

(d) Incomes increase as the size of the community in which the lawyer practices increases. The lowest average salary of $5639 was reported by lawyers in towns under 1,000 population and the highest income of $12,709 in cities over one million.

(e) Significant differences were shown by regions. The Middle Eastern region, including New York and Pennsylvania, ranked first in average income with $11,520 while the Northwest region was low with an average of $8,420. The highest average of any state was $12,185 for California, and the highest average of any large city was in San Francisco with $13,157 compared to a low for Boston of $9,882. The highest salary average was found in Illinois with $12,288 and in Chicago with $13,106.

(f) Incomes increase with the age of the lawyer as well as years in practice. Lawyers aged 55 to 59 were at their earning peak, although income was relatively stable between ages 45 and 65. Maximum earnings were not attained until after twenty-five years of practice.

(g) Full-time lawyers fare better than part-time practitioners.

II. *The Legal Service Industry*

Although the practice of law is a profession, the U. S. Government recognizes the legal service industry[5] as a distinct branch of the legal profession. This branch is made up of those lawyers working as independent practitioners—providing legal services to individuals and business on a fee or contract basis. It excludes the salaried lawyers who work in private industry, in educational institutions, in government service or in the judiciary.

In 1954, about 1.6 billion dollars, or one half of one per cent of the total national income, directly originated in the legal services industry. Medical and other health services accounted for 6.1 billion dollars or 2 per cent of the national income while engineering and other professional services contributed 1.3 billion dollars to our national income.

American individuals in 1954 spent slightly more than one billion dollars for legal services, representing an increase of 17 million dollars over 1953 and an increase of 59 million dollars over 1952. While there was an increase in the amounts spent for legal services from 1952 to 1954, these increases did not keep pace with the increases in total personal consumption expenditures or with the increases of personal consumption expenditures for physicians and dentists. American individuals spend nearly three times more for physicians than for legal services, and nearly as much for dentists as for legal services. Furthermore, Americans spend far greater sums on such personal categories as cosmetics, tobacco products, alcoholic beverages, movies, toilet articles and preparations, drug preparations and sundries than for legal service.

The legal service industry is also an important source of employment and wages. In 1954, the total compensation (including social insurance and other labor income) of non-legal employees in the legal services field totalled 392 million dollars; of this amount, 383 million dollars represented total wages and salaries for non-legal employees in the industry. The "legal service industry" had a total of 134,000 full-time employees, and a total of 149,000 when part-time employees are included. The average annual earnings per full-time employee in the "legal services field" was $2,785. In 1954, the Bureau of Census lists 244,000 persons engaged in the "legal services industry", representing an increase of 5,000 over 1953 and an increase of 11,000 persons over 1952; these figures included all "active proprietors" (including partners) and full-time employees including stenographers, secretaries, bookkeepers, accountants and others employed in a law office, but excluded salaried lawyers and their employees employed directly by a manufacturing company or government agency.[6]

Although lawyers do considerable paper work, it is surprising to note that lawyers on the average only employ one employee per lawyer and less than 20 per cent of all lawyers employ two or more persons. At the same time, there is a definite positive relationship between the gross income of lawyers and the number of employees. Approximate-

5. The legal service industry, as distinct from the legal profession, includes only that income which is received by lawyers in their capacity as independent practitioners—i.e., providing legal services on a fee or contract basis. It includes the total of income earned by law associates and non-salaried lawyers and others (part-salaried) from independent practice.

6. The Bureau of Census lists 111,000 independent lawyers in 1954; this figure is an estimate of the number of lawyers with major source of income from independent practice, based on the 1940 and 1950 censuses (See Table 5 and footnotes in Liebenberg, op. cit., page 29). These figures omit the thousands of lawyers who are full-time salaried lawyers, the government lawyers, members of the judiciary, lawyers in private industry, and others who receive all their income from non-independent practice. These figures may be understatements, however, because many members of the bar working in other fields may not list the law profession with the Census.

At the same time, the number of independent lawyers listed by Martindale-Hubbell may be overstated due to dual status listings. For example, a lawyer listed as a member of the State Legislature and also indicated as a partner of a law firm was tabulated under the subdivision "state" in the government service division and also under the subdivision "partner" in the "private practice" division. This also is applicable to other branches of government service except U.S. and assistant U.S. attorneys and federal, state and county judges.

ly three quarters of all lawyers with gross incomes exceeding $30,000 employ two or more persons while the peak percentage of lawyers employing only one person is found in the $10,000 to $15,000 gross income class. Furthermore, the average pay per employee rises with gross income which is usually higher in the large firms and in the urban centers.

Total gross income for the entire legal service industry increased from about 1.3 billion dollars in 1947 to almost 2 billion dollars in 1954, an increase of about 55 per cent. Total net income for lawyers in this period increased from 0.8 billion dollars in 1947 to approximately 1.2 billion dollars. The expenses of lawyers have been increasing and the ratio of net profits has been decreasing, for the ratio of net to gross income dropped in the 1947 to 1954 period from 65 to 61 per cent.

A. *Sources of Legal Income*

In 1954, approximately one half of the total gross income of all non-salaried and part-time salaried lawyers was received from individuals and the remainder came from legal services rendered to the business community. There has been a shift in the nature of legal clientele since 1947 when 71 per cent of the non-salaried lawyers reported that they received more than one half of their gross income from individuals as contrasted with 67 per cent in 1954.

Three quarters of all lawyers derive the major source of their income directly from the legal service industry. This includes the non-salaried lawyer, the major independent who also receives some salary, the lawyer who works on a salary for a law firm, as well as the lawyer whose major source of income comes from salary in a law firm but who also has some independent practice. The remaining lawyers derive the major source of their income from other industries: (1) salaries in other industries only—lawyers in private industry; judges; teachers of law; civilian, non-judicial government lawyers; and lawyers in other organizations; and (2) salaried lawyers who also do some independent work.

Since 1947, there has been a shift in the organizational pattern of lawyers. The proportion of individual practitioners has dropped from 74 per cent to 65 per cent while the percentage in two-member firms has risen from 15 to 18 per cent. The percentage of lawyers in firms having nine or more partners rose from 1.3 per cent to 2.2 per cent. In fact, there is an increase in each of the categories above the solo practitioner, offsetting the drop in percentage of the solo lawyers. Similar results are seen for the number of firms by size of members; the percentage of individual firms decreased from 88 per cent in 1947 to 83 per cent in 1954, while the percentage of two-member law firms rose from 8.8 to 11.5, and the larger firms nearly doubled.

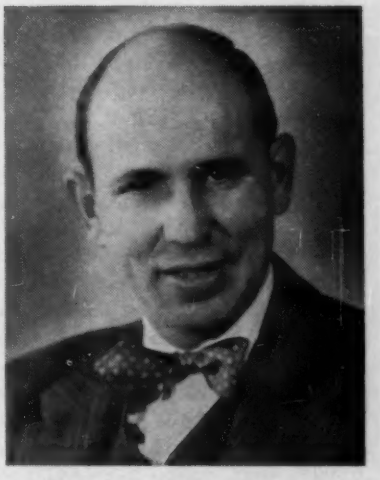
A number of lawyers practice on a part-time basis. Approximately 8 per cent of the sample covered by the Survey of Current Business were in this status. This group consisted of lawyers whose exclusive source of earnings was from legal work as well as those who had supplementary extra-legal earnings. The per cent of lawyers reporting part-time status is somewhat higher among the major independent lawyers.

B. *Number of Lawyers*

There are approximately a quarter of a million lawyers in the United States, or one lawyer for approximately every 800 persons in the country. Actually, Martindale-Hubbell accounts for 241,514 lawyers but lists 219,380 lawyers after adjustments for multiple listings and incomplete forms.

Lawyers are divided into various groups by Martindale-Hubbell. The largest number of lawyers, approximately 190,000 or nearly 90 per cent of the total, are engaged in private practice, while nearly 46,000 are salaried lawyers. Nearly 6600 lawyers classify themselves as retired or inactive.[7]

Of the 190,000 lawyers engaged in private practice, approximately 70 per cent are solo practitioners.



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slightly more than one-quarter are partners, and about five per cent are associates. Of the 45,630 salaried lawyers, one-third are engaged by private industry, 3 per cent are on a full-time salaried basis with educational institutions, nearly one-half are in the government service and 17 per cent are in the judicial service.

New York state with nearly 40,000 lawyers has by far the greatest total number of lawyers of any state and with the exception of the District of Columbia has the highest concentration of lawyers on a per capita basis. One out of every six lawyers in the country has his law office in New York, while California has the second largest number of lawyers with 18,683 followed by Illinois with 17,512, Ohio with 13,648, Texas with 12,098, Pennsylvania with 10,877 and Massachusetts with 8,820. The smallest number is found in Nevada with 350 lawyers, followed by Delaware with 380, Vermont with 420, Wyoming with 451 and New Hampshire with 551 lawyers accounted for in 1955.

7. See footnote 5 above.

On a per capita basis, Washington, D.C. has the greatest concentration of lawyers, followed by New York, Nevada, Maryland, Massachusetts, New Jersey, Illinois and Virginia. States with a small concentration of lawyers on a per capita basis include Pennsylvania, Alabama, North Carolina and Tennessee.

Manhattan and the Bronx have the largest number of lawyers, accounting for nearly ten per cent of all the lawyers in the country. Chicago is the city with the next greatest number of lawyers with nearly 12,500 followed by Washington, D.C. with 8,700 lawyers. Los Angeles has 6,000 lawyers, Boston lists 4,641 and Philadelphia has approximately 4,000 members of the legal profession.

C. *Background*

Statistically speaking, the American lawyer was born in the decade 1905-1914, for the median age of all lawyers is 45 years. Only one out of every two lawyers received a college degree but three out of every four lawyers received a law degree and 90 per cent of all lawyers attended law school. Slightly more than half the lawyers practice in large communities with populations of 200,000 or more. Nearly half the lawyers in the country are solo practitioners while nearly one out of every four lawyers is a partner in a law firm. One out of every 50 lawyers is a woman, and one out of every 28 lawyers is a member of the judiciary. Approximately one out of every three lawyers is a member of the American Bar Association.

III. *Incomes of Lawyers*

A. *Changes 1947-54*

The net incomes of lawyers have been increasing during the past eight years.[8] From 1947 to 1954, the average net income of all lawyers increased 36 per cent from a mean net income of $7530 to $10,220. The median net income rose from $5700 to $7,835 in the same period.[9] All the major groups of lawyers shared almost equally in the income rise since 1947, but the all-salaried group of lawyers had the highest average in 1954 as well as in 1947. Due to the inflation with the rise in consumer price index from 1947 to 1954, approximately one third of the 36 per cent increase represented a gain in real income or purchasing power for the lawyers.

There were marked shifts in the groups up the income scale from 1947 to 1954. Recently nearly one fifth of the major independent lawyers were classified above $15,000 and only one-third below $5,000 compared with the 1947 figures of one-tenth and one-half respectively. In the salaried group, the percentage below $5,000 dropped from one-third to one-eighth, and the group above $15,000 increased from 8 to 15 per cent in 1954.

The increases affected different groups of lawyers in different ways. Lawyers ranked below $10,000 in 1950 enjoyed, in general, considerably higher than average increases in income. The group classified under $5,000 in 1950 enjoyed income increases almost three times the average increase for all lawyers. As higher income levels are reached, the pattern is one of ever decreasing percentage changes, for those non-salaried lawyers who had net income levels of $15,000 and over in 1950 enjoyed an increase of only 13.5 per cent by 1954.

At the same time, not all lawyers shared in the prosperity and there was an extreme diversity of income movements from 1950 to 1954. For example, in the group below $5,000 in 1950 (which experienced the greatest increases averaging 84 per cent), one-eighth actually were ranked lower in 1954 than in 1950. The $15,000 and over level showed the greatest stability but even in this group nearly one-quarter had 1954 incomes below 1950 while about 40 per cent improved their incomes. In every level of income, from 12 to 25 per cent of the group showed decreases in incomes from 1950 to 1954.

Another striking fact is that the relative distribution of lawyers has moved slightly toward equality from 1950 to 1954. All groups experienced increases in their shares of total income with the exception of the highest which dropped from 49 to

(Continued on page 853)

8. The income data for 1954 are based on Liebenberg, *Income of Lawyers in the Post-war Period*, 36 SURVEY OF CURRENT BUSINESS 26 (December, 1956). The income data for 1947 are based on U.S. Dept. of Commerce, *Income of Lawyers, 1929-1948* SURVEY OF CURRENT BUSINESS 5 (August, 1949).

9. The (arithmetic) mean or average income is equal to the sum of all the incomes divided by the number of income recipients. The median income is that income below which (and above which) half of all the income recipients fall; the median is less affected by the few high or the few low income cases. The difference between average (mean) and median is well explained by Reginald Heber Smith, Director of the Survey of the Legal Profession as follows:

"Statisticians use the terms *mean* and *median* as freely as lawyers use the terms *tort* and *replevin*. To each group the words have exact significance; but neither group can understand the terminology of the other.

"Lawyers have a justifiable complaint because, when they have recourse to the dictionary, their confusion is confounded.

"Webster defines *mean* as '1. Occupying a middle position; intermediate in place'. The statistician uses *mean* in a wholly different sense which is Webster's '2 Math. Average. Syn. See Average'.

"It would be helpful if *average* could be used and *mean* eliminated because—

"Webster defines *median* as '1. Being in the middle'. But the next definition unlocks the secret. '2. Statistics. Designating a point so chosen in a series that half of the individuals in the series are on one side of it, and half on the other'.

"Here is an illustration that you can easily remember always:

"As a leader of the Bar in your community, you have invited ten other lawyers of differing ages to dine with you at fortnightly intervals and after dinner you discuss matters of common interest.

"One topic is the economic condition of the Bar. You all exchange information freely. You find that the 1955 earnings of your group were:

Lawyer	Income	Lawyer	Income	Lawyer	Income
1	$11,000	6	$6,000	7	$5,000
2	10,000			8	4,000
3	9,000			9	3,000
4	8,000			10	2,000
5	7,000			11	1,000

"Your group of 11 lawyers has a total 1955 income of $66,000. The *average* is $6,000.

"The *median* (the lawyer in the middle) is $6,000.

"What then is the difference?

"Well, during 1956 you won a big case and earned an extra fee of $100,000. The incomes of other lawyers remained constant.

"So the 1956 earnings for your group were:

Lawyer	Income	Lawyer	Income	Lawyer	Income
1	$111,000	6	$6,000	7	$5,000
2	10,000			8	4,000
3	9,000			9	3,000
4	8,000			10	2,000
5	7,000			11	1,000

"Your group of 11 lawyers has a total 1956 income of $166,000. The *average* is $15,090.

"The *median* still is $6,000.

"The *median* escapes from the distortions resulting from extremes. Generally, it is the figure that conveys the more accurate impression.

"But lawyers will do well to follow along with the statisticians and give both figures—the *average* (mean) and the *median*."

Practicing Law:

The Case for the Individual Practitioner

by Eugene C. Gerhart · *of the New York Bar (Binghamton)*

Lawyers are traditionally independent, self-reliant men, which may explain the reason why two thirds of the members of the legal profession in this country practice alone, resisting the allure of the alleged benefits of the law firm. In this article, Mr. Gerhart, himself an individual practitioner, discusses the problem of the solo lawyer versus the partnership member, setting forth the relative advantages and disadvantages of both kinds of practice.

He travels the fastest who travels alone.

—Kipling

Two out of every three American lawyers are individual practitioners. That means that two thirds of the American lawyers practice on their own, have their own individual offices, make their own independent decisions and serve their own individual clients. Only one lawyer in four in the United States is a member of a law firm. The case for the individual practitioner is therefore the case of the majority of American lawyers.

Recently some distinguished lawyers have alluded to this situation and have invited an explanation of these admitted facts.[1] Reginald Heber Smith, a recognized authority on the subject of law office organization, has concluded that, "All this historical evidence, which is buttressed by many talks with many lawyers, constrains me to believe that there *is* an antipathy between the typical or average American lawyer and the idea of organization for the practice of law.[2]"

Is the individual practitioner stubbornly clinging to outmoded ideas of how law should be practiced? Is the individual practitioner inefficiently organized? Are two thirds of American lawyers poorly organized to serve their clients? Are individual practitioners failing to reap the rewards of a satisfying lifetime at the Bar because they are not members of a law firm? These are legitimate questions. They deserve a full, frank, honest answer.

Since it is private law practice, rather than any of the varieties of government legal service that we are discussing, we find that lawyers fall into four main categories, as follows:

1. *Individual practitioners.* These are lawyers who practice without partners.

2. *Firm or partnership practice.* A law firm may range in size from a minimum of two lawyers to the great metropolitan firms which may have as many as twenty-five or more partners, and more than one hundred associates, law clerks and clerical staff. These latter firms are the ones which have been irreverently dubbed "law factories".[3]

3. *Associates.* An associate is a lawyer who works for a law firm or for an individual practitioner.

4. *Employed lawyers.* An employed lawyer is one who works for a lay concern. He may range in status from the general counsel for a billion-dollar insurance company to the lawyer for a small business concern, charity or social agency. He is usually on a salary basis and is not generally regarded as being in private law practice, even though he may handle occasional cases for clients in odd hours.[4]

1. Smith, *A 1956 Sequel: Law Office Organization*, 42 A.B.A.J. 144 (1956); Tweed, *The Changing Practice of Law*, 11 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 13 (1956); Mayer, *The Wall Street Lawyers*, 212 HARPER'S MAGAZINE, 31 and 50 (January and February, 1956); Swaine, *Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar*, 35 A.B.A.J. 89 (February, 1949); Ballantine, *The Business Lawyer*, 28 N. Y. ST. BAR BULL. 128 (April, 1956). See *Lawyers Looking at You*, 3 FORTUNE MAGAZINE 61 (1931).

2. Smith, *op. cit. supra*, note 1, at 147.

3. Lundberg, *The Law Factories*, 179 HARPER'S MAGAZINE 180 (1939).

4. A good discussion of these distinctions will be found in Redden, CAREER PLANNING IN THE LAW (Indianapolis: The Bobbs-Merrill Company, Inc., 1951), pages 8-63; especially pages 8-9. See also Vanderbilt, STUDYING LAW (1st ed., New York: Washington Square Publishing Corporation, 1945), pages 695, *ff.*; Blaustein and Porter, THE AMERICAN LAWYER (Chicago: The University of Chicago Press, 1954), pages 8-11.

The problem raised concerning the relative merits of individual practice as against firm practice does not involve the employed lawyer at all; it only indirectly involves the associate lawyer. The basic difference in viewpoint, so far as law office organization is concerned, is between the individual practitioner and the law partner and law firm. The individual practitioner more nearly resembles the British barrister; the law firm is more akin to the English firm of solicitors, although neither analogy is fully accurate.[5] The fair way to come to some conclusions as to the relative merits of individual practice and firm practice is to analyze the advantages and disadvantages of each type and leave the reader to draw his own conclusions. Let us analyze both firm and individual practice separately and from the following points of view: first, from the standpoint of the client and the community; second, from the standpoint of the lawyer himself; and third, from the standpoint of the legal profession as a whole.

II. *Advantages of Firm Practice*

About 25 per cent of American lawyers are partners in law firms—one out of four.[6] There are certain advantages to the community and to clients in partnership law practice. Association of a group of lawyers permits the lawyers to discuss clients' problems with each other. It permits specialization in tax, labor, matrimonial, corporate, banking, trust and other types of legal work. The purpose of specialization is to increase efficiency. It permits development of legal "expertise" on the part of various members of the firm. This may increase the special knowledge the lawyer expert can bring to bear on a problem. Specialization permits a firm to offer a wide variety of legal talents to the community. Such pooling of talent, experience and knowledge may enable the firm to offer more specialized abilities to a community and to clients than that offered by an individual practitioner. This is probably the outstanding advantage of firm practice to both the client and the community.

There are advantages to the individual firm partner in partnership practice. A partnership may bring a lawyer clients and income which he could not himself attract alone. It may bring to the legal specialist, clients who are attracted to the firm in its character as a firm engaged in general practice. Over a period of years the firm may build up a prestige which will carry on even after the original partners who established it have retired from active practice.[7] There is less financial strain on the individual law partner. He generally is assured of a minimum drawing account which provides him with a fixed income on which to live. His share of the office overhead is proportionately lower because he shares it with his partners. There is less personal responsibility on the individual partner for the final decisions arrived at by the firm; since as only one member of a group he has the benefit of group anonymity. He also has less responsibility for attracting clients and for maintaining business contacts, although his share of the profits may reflect his ability in obtaining clients. The partner lawyer has a greater opportunity to become a specialist. While he concentrates on a narrow field of the law, the rest of the members of the firm round out the general practice aspects of firm business.[8] The partner need not rely on his own judgment alone because he has the advantage of consultation with his fellow members of the firm. The partner may have more assistance in preparing a case or in investigating the law or the facts.

The available statistics show that the average partner earns a higher income per year than the average individual practitioner.[9] The fees which the partner lawyer charges his firm's clients may be higher than he would be able to charge himself for the work he actually does. A partner may also find that a firm will support him either while he is ill or even after he has reached retirement age.

There are also advantages which accrue to the legal profession as a whole from partnership practice. When the firm is a large metropolitan firm, it is much easier for a partner lawyer to devote a larger amount of his time to bar activities than if he practices alone. It is no secret that the President of the American Bar Association is required to devote almost his entire time during the year he holds office to the duties of his position as leader of the national Association. He just cannot devote the time to his private law practice that it requires if he is to do the President's job effectively. His firm can carry on for him while he is on leave serving our profession. However, there have been individual practitioners who have done the same task with eminent success. Among other advantages to the legal profession are the larger financial contributions which come from the larger firms for such professional projects as the American Bar Center, legal aid, memorial law libraries and similar professional projects.

My friend, Reginald Heber Smith, of Boston, has concluded that there is an antipathy between the typical or average American lawyer and the idea of organization for the practice of law.[10] When we speak of an antipathy for the idea of organization for the practice of law we must make a distinction. A firm or part-

5. See, *e.g.*, Tweed, *The Changing Practice of the Law*, 11 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 13 (1950) at page 18.

6. Blaustein and Porter, THE AMERICAN LAWYER, page 8.

7. See Vanderbilt, STUDYING LAW, pages 694 *ff.*; Redden, CAREER PLANNING IN THE LAW, pages 19-24.

8. A leading New York lawyer, commenting upon the career of business or corporation lawyers, writes, "The young lawyer choosing a career need not fear that to become a corporation lawyer will mean any sacrifice of the development of rounded personality", Ballantine, *The Business Lawyer*, 28 N. Y. ST. B. BULL. 128 (April, 1956), at 129. Indeed such corporation lawyers have been labelled the "Keepers of the Business Conscience". Mayer, *Keepers of the Business Conscience*, THE WALL STREET LAWYERS, Part II, 212 HARPER'S MAGAZINE 50 (February, 1956).

9. See Redden, CAREER PLANNING IN THE LAW, page 15; Blaustein and Porter, THE AMERICAN LAWYER, page 11.

10. *A 1956 Sequel: Law Office Organization*, 42 A.B.A.J. 144 (1956) at 147.

nership may be organized in the sense that it is legally organized under the partnership law as a law firm. I assume that is the sense in which Mr. Smith uses the term. It may also mean that the firm is organized in the sense that it is an organized group working effectively, harmoniously and efficiently for its clients. Organization in the first sense does not necessarily mean organization in the second sense. There are some drawbacks to partnership practice of the law which may be among the reasons for the antipathy which Mr. Smith has discovered among many American lawyers toward partnership practice. It would be an unusual situation if there were no disadvantages in firm practice. There are some important ones, from the point of view of the community, the client, the lawyer and the profession itself.

III. *Disadvantages of Partnership or Firm Practice*

Lord Bacon wrote that, "He that hath wife and children hath given hostages to fortune; for they are impediments to great enterprises, either of virtue or mischief." This philosophical observation did not prevent Bacon himself from taking a wife as a partner in matrimony. Similarly, the lawyer who takes on a partner or partners himself has given hostages to his fortunes as a lawyer. What are some of the disadvantages in firm practice?

First, from the standpoint of the client and the community, firm practice generally results in higher charges for legal work. This is not always so. Yet it is inescapably clear that the larger overhead of the law firm must be paid for by the clients the firm serves. The requirement of financing the larger law offices necessarily means that the firm must concentrate on securing wealthy clients to support the office. Getting business and attracting large corporations and wealthy clients necessarily becomes a primary consideration for the members of large law firms. This fact can be readily admitted for young lawyers are even advised to include such a wealth-attracting partner in selecting members of their firms.[11]

This emphasis on getting lucrative business as one of the primary objectives of the firm's law practice inevitably has an effect on the viewpoint of the individual lawyer in the firm. When getting business which will produce large legal fees becomes a necessary objective for survival then there is a tendency for the lawyer-partner to reflect the business viewpoint. There is the silent but powerful pressure to accept only popular cases which will not offend the firm's wealthy clients. There is a tendency to refuse to do work for socially unacceptable clients, regardless of the merits of their individual cases. Certain clients are not represented "because it is not done". There is a tendency to play up to both political parties in order to have a foot in either camp no matter which party wins the election. Such tendencies have evoked strong criticism of the larger firms in the past.[12]

In addition, there is the obvious need to protect the good name of the firm. Public relations becomes a very serious matter in firm practice. The inevitable result is that many large firms tend to reflect the viewpoint of the businesses they represent. The "law factories" have been severely criticized for that in the past, by critics whose judgment cannot be ignored.[13] Some of the leading corporation lawyers themselves have recognized this fact.

> While the charge that our profession has become "the obsequious servant of business" is, I believe, intemperate and exaggerated, it must be conceded that professional service to a single corporate client long continued contains a real threat to the lawyer's independence of thought, or at least of expression. This threat is necessarily greatest in the case of the salaried members of the Bar employed by the corporate legal departments. It is not human to expect that corporate executives will view with equanimity crusading espousal by members of its legal staff or of its regular outside firm of counsel, of political, economic or social doctrines believed to be against the corporation's interests.[14]

From the client's standpoint there are two other aspects of firm practice which work to his disadvantage. Law firms have the ethical right to continue in the firm name the name of a deceased partner.[15] The reason for doing this, primarily, is to continue the prestige which has grown up around that name. In one of the large New York City firms the firm name contains the name of one "partner" who died more than thirty-five years ago. His talents are certainly not available to the client in 1956! Without implying that the prospective client may be actually misled by such non-existent firm partners, it is clear that such a practice permits a firm to have the benefit of what may be termed almost corporate existence.

A second problem is that clients who are attracted to the large firm often have their cases handled by younger men whom they would not have consulted had the younger lawyers been practicing on their own. The client's work, however, is frequently delegated to these subordinates whom the client did not select at all. It has been contended, in mitigation, that such delegation enables the client to get the benefit of the maximum of legal service—"that

11. "Another [member of the firm] should be someone prominent socially or politically with a flair for public relations which will attract accounts to the office." Redden, CAREER PLANNING IN THE LAW, page 18. "To meet such a payroll requires a considerable income: no law firm of fifteen or more partners can live on total fees of less than one million dollars a year. 'For an average firm', said a Wall Street partner recently, 'two or three million would not be an extraordinary year.'" Mayer, *The Wall Street Lawyers*, 212 HARPER'S MAGAZINE 31-32 (January, 1956).

12. See the criticisms collected in II Swaine, THE CRAVATH FIRM, 463 number 1. Mr. Swaine's views on this point are enlightened ones and well worth reading. *Id.*, pages 462-66.

13. Chief Justice Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1 (1934); Kales, *An Unsolicited Report on Legal Education*, 18 COL. L. REV. 21 (1918); John Henry Wigmore, in Cheatham, CASES AND MATERIALS ON THE LEGAL PROFESSION, pages 33-34; Mason, BRANDEIS, A FREE MAN'S LIFE (New York: Viking Press, 1946), page 437; II Swaine, THE CRAVATH FIRM, pages 462-66. See Mayer, *Keepers of the Business Conscience—The Wall Street Lawyers*, Part II, 212 HARPER'S MAGAZINE 50 (February, 1956) at page 55.

14. Swaine, *Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar*, 35 A.B.A.J. 89 (1949) at page 171.

15. Drinker, LEGAL ETHICS (New York: Columbia University Press, 1953), Canons of Professional Ethics, No. 33.

every stone will be turned, every detail explored and understood".[16]

What about the case of the lawyer himself who casts his lot with the large law firm or who decides to practice in partnership? What is the price which he pays for the advantages of partnership practice? One of the advantages of partnership practice is specialization. The price of specialization is knowing more and more about less and less. Law practice for the specialist tends to become departmentalized and routine.[17] He is inclined to practice in water-tight compartments. He finds that specialization restricts his growth and well-rounded development as a lawyer. The late Mr. Justice Robert H. Jackson himself told a bar association once that:

> This tendency to demoralize the general practitioners and to create a bar of specialists has an effect upon the judiciary. No person who rightly appreciates the advantages of the division of labor will deny an important place in an advisory and consultive way to the specialist, but his seat is not the seat of judgment. That seat calls for a breadth of view and understanding which may not be so deep as the specialist's, but must be broader.[18]

There are other drawbacks to the partner lawyer. His client contacts are usually limited to those in his specialty. His own independence of judgment and of action are restricted and restrained by the conflicting views of his partners and associates. There are penalties for "getting out of line" which may include termination of his interest in the partnership. There are inevitable delays in consulting other partners. There is the feeling of frustration which comes from an inability to make final decisions. Another problem, not often mentioned but nonetheless real, is that of uncongenial partners as well as partners who have reached the unproductive years and yet must be carried on the back of the more active members of the firm. Inevitably there will be some partners who do not keep up the pace. This works to the disadvantage of the more talented members of the firm. Another problem is the inevitable conflict of ambitions which bedevils every large organization. This creates tension in the firm and, if it goes far enough, may result in the firm splitting up because the conflicts cannot be reconciled.

There are problems for the young lawyer who casts his lot with the big law firms. His legal work immediately becomes specialized. He handles only a portion of any big case. He may be impressed by the large sums involved in the cases of nationally known clients and by the big fees such clients pay. However, he usually does not share those fees. If, after he has been with the firm ten years he has not been made a junior partner, he is usually doomed to be an associate for life so far as that firm is concerned.[19]

Firm practice also has certain disadvantages from the point of view of the profession generally. The higher fees charged by the bigger firms tend to create the impression that all lawyers are high-priced and charge too much.[20] The complaint is also made that the firms represent only the business viewpoint or the viewpoint of the wealthy rather than the public viewpoint or the individual's viewpoint. Attorney Louis D. Brandeis, although himself a member of a partnership, voiced this complaint loudly before he became a Supreme Court Justice.[21] It is also a limitation on the legal profession generally to develop a Bar of specialists. Specialization has advantages, but a legal profession composed solely of specialists would lose more than it would gain.[22]

So much for the pros and cons of partnership practice. What about the merits and demerits of individual practice?

IV. *Advantages of Individual Practice*

We should distinguish several types of individual practice. Individual law practice may vary from the single lawyer in his office with one secretary to a single lawyer who has several other people on his staff including secretaries, bookkeepers, one or more associate lawyers, a law clerk or two and perhaps an investigator. But in either case he is an individual practitioner because he is solely responsible to the client and the court for all decisions made in his office. He practices under his own name. He has sole responsibility for all decisions and, what is more important, he exercises complete freedom of judgment and action.

The individual practitioner is not to be confused with the "country lawyer", who is to be contrasted with the "city lawyer".[23] Probably most country lawyers are individual practitioners; but many city lawyers, like the late Lloyd Paul Stryker, are also individual practitioners. A general practitioner need not necessarily be an individual practitioner, although the individual practitioner is usually, but not always, a general practitioner.

The man we are interested in is the individual practitioner, regardless of whether he is a general prac-

(Continued on page 856)

16. Mayer, *The Wall Street Lawyers*, 212 HARPER'S MAGAZINE, page 33, (January, 1956).

17. Some large firms recognize this and take steps to overcome the cramping effects of specialization. See II Swaine, THE CRAVATH FIRM, page 466.

18. Mr. Justice Robert H. Jackson, Address to Beaver County Bar Association, Beaver Falls, Pennsylvania, March 30, 1935 (in his Unpublished Speeches); Laski, THE LIMITATIONS OF THE EXPERT (London: The Fabian Society, 1931); Barnard, THE FUNCTIONS OF THE EXECUTIVE (Cambridge, Mass.: Harvard University Press, 1950), page 222.

19. See Mayer, *The Wall Street Lawyers*, 212 HARPER'S MAGAZINE, page 53, (February, 1956); See II Swaine, THE CRAVATH FIRM, page 7, for an interesting account of how the top New York City firms pick their partners. For a doleful picture of the poor associate who does not make it in the metropolitan competition, read *A Fable* in 21 HARVARD LAW SCHOOL RECORD (No. 10, December 1, 1955), page 4.

20. See the *Memorandum Concerning Complaints Against Lawyers*, submitted as part of the Survey of the Legal Profession, dated February 11, 1949, pages 10-12; see Blaustein and Porter, THE AMERICAN LAWYER, pages 33-37 and 258-59.

21. Brandeis, *The Opportunity in the Law*, in BUSINESS—A PROFESSION (Boston: Hale, Cushman and Flint, 1933), page 329; Mason, BRANDEIS, LAWYER AND JUDGE IN THE MODERN STATE (Princeton: Princeton University Press, 1933), pages 21-22, 92; Mason, BRANDEIS, A FREE MAN'S LIFE (New York: The Viking Press, 1946), page 437; *cf.* pages 83-85.

22. Joiner, *Specialization in the Law: Control It or It Will Destroy the Profession*, 41 A.B.A.J. 1105 (1955). *Cf.* Siddall, *Specialization in the Law: A Retort to Professor Joiner's Call for Control*, 42 A.B.A.J. 625 (July, 1956).

23. Hays, CITY LAWYER (New York: Simon and Schuster, 1942); Partridge, COUNTRY LAWYER (New York: Grossett and Dunlap, 1939); Shute, A COUNTRY LAWYER (New York: Grosset and Dunlap, 1911); Patterson, *A Young Lawyer Looks at Rural Practice*, 61 CASE AND COMMENT 28 (May-June, 1956).

Military Law:

Drumhead Justice Is Dead!

by William C. Hamilton, Jr. • *Captain, United States Air Force*

Civilian lawyers are not so well acquainted with the Uniform Code of Military Justice as they should be, Captain Hamilton writes. As a result, there is still a considerable body of professional opinion that is acutely critical of military justice although he contends that the grounds for such criticism were removed by the complete revision of military justice following World War II. In this article, Captain Hamilton compares the rights of an accused serviceman under the Code with those of a civilian accused of a federal criminal offense. The article is a reply to one published earlier, 42 A.B.A.J. 521 (June, 1956).

In the AMERICAN BAR ASSOCIATION JOURNAL of June, 1956, an article entitled "Military Law: Return to Drumhead Justice?" appeared. Written by William F. Walsh, of the Texas Bar, this article no doubt provided interesting reading for lawyers who are unfamiliar with the present-day military legal process prescribed by the Uniform Code of Military Justice. But to those of us presently serving as lawyers in the military service, the pattern was a familiar one. Professional publications, in addition to publications of general interest, continue to accept for publication writings which are severely critical of the administration of military justice by the Armed Forces. The publicity value of such criticism remains high.

The administration of military justice will continue to be in disrepute so long as the legal profession is not made aware of the fact that hundreds of years of legal experience, both civilian and military, have entered into the formulation of the Uniform Code of Military Justice, the *Manual for Courts-Martial*, and the administration of both of these documents.

No system of justice is beyond improvement. The courts, the bar associations and the individual members of the Bar are constantly seeking change which can effect improvement in our system of criminal jurisprudence. This is just as applicable to those concerned with military justice as it is to those involved with the administration of civilian criminal law. The interest of bar associations and civilian attorneys in the administration of military justice is of vital importance to the legal departments of the Services, because such interest is essential to effective and improved administration. Criticism is welcomed, since by that method interest is engendered and improvement effected. Military lawyers ask only that such criticism be constructive in nature and predicated upon research and experience. Concerning Mr. Walsh's article, a knowledge of the necessities giving rise to the various recommendations of the Judge Advocates General for amendment to the Uniform Code of Military Justice and the legal theories upon which these recommendations are based is indispensable to intelligent and helpful criticism.

With these thoughts in mind I will attempt to answer Mr. Walsh. No sustained effort will be made to defend each of the amendments proposed since areas of disagreement as to merit exist even among military lawyers. The concept that these amendments represent a desire to return to the "old system" in addition to showing a lack of legalistic thinking can, however, be proved false.

Military Justice . . . *The Federal Judiciary*

Let us examine first the present system of military justice in its relation to the federal judiciary. A sharp dividing line has always existed between the court-martial system and the judicial system of the United States. The United States Supreme Court long ago ruled that the court-martial system is not a part of the judicial system of the United States in *Dynes* v. *Hoover*.[1] The Court

1. *Dynes* v. *Hoover*, 20 How. (61 U.S.) 65, 15 L. ed. 838 (1859).

therein stated, after considering the various provisions of the Constitution, "These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that power to do so is given without any connection between it and the third Article of the Constitution defining the judicial power of the United States; indeed that the two powers are entirely independent of each other." With this wide gulf between civilian and military criminal jurisprudence, military law has been allowed to develop without a great deal of interference by either military or civilian legal assistance, the emphasis until recently being upon military necessity and discipline rather than protection of the individual rights of the accused. The two systems have therefore not developed in parallel.

However, excesses which came to light following World War II, causing the pendulum to swing in the other direction, resulted in a changed concept of court-martial justice, embodied first in the so-called Elston Act[2] and then in the Uniform Code of Military Justice. This Code has provided greater uniformity among the Armed Services and insures an accused numerous safeguards not present before or during World War II. Therefore, in one great stride, the administration of military justice, in its attempt to avoid unjust treatment of accused persons, has actually advanced up to and in some respects beyond the stage reached in civilian criminal justice.

An examination of the Code and its legislative history indicates that Congress clearly intended that military justice should parallel as closely as possible federal criminal practice where not inconsistent with the provisions of the Uniform Code. A further examination shows that wherever inconsistencies exist, they favor an accused by granting to him many additional rights over and above those granted an accused in civilian courts. Boards of review and the United States Court of Military Appeals have consistently held that the principles of law and the rules of evidence generally recognized in criminal cases in the United States District Court apply to the trial of cases by courts martial.[3] In regard to the rights granted servicemen, it is interesting to note that the United States Court of Military Appeals has concluded that such rights do not stem from constitutional guarantees, but rather are based solely upon federal legislation.[4]

An Accused Serviceman . . . *An Accused Civilian*

In order that present-day military justice be viewed in its proper perspective, I feel it pertinent to examine in detail the various steps involved in the trial of an accused by court martial under the Uniform Code, at the same time pointing out the similarities and distinctions existing between military justice and civilian criminal law. By superimposing the military procedure upon civilian criminal procedure, the reader can observe the time-consuming nature of some of the military procedures and can distinguish the additional legislative protective guarantees beyond the constitutional rights accorded an accused civilian.

Anyone subject to the Uniform Code[5] may initiate sworn charges against a serviceman or an individual otherwise subject to military jurisdiction.[6] It is customary, however, that a person subject to the Code report the facts to the accused's commander who may then prefer charges.[7] Upon receipt of such information or sworn charges, the commander is required to make a preliminary inquiry in order to make intelligent disposition of the case.[8] If he decides that charges should be preferred, he then takes appropriate action. This step corresponds to action of the district or county attorney in issuing a warrant for arrest.[9]

If the accused's commander determines that the alleged offense is of serious nature, he forwards the charges with his report of investigation to the next higher commander who reviews the case and decides what action to take. At this stage he has the advice of his Staff Judge Advocate, an experienced lawyer. The decision may be made to refer the case to a special court at this level of command, or to refer it with his recommendation to a higher commander exercising general court martial jurisdiction, depending upon the seriousness of the charges.

For the purpose of this illustration, we assume that the intermediate commander has recommended trial by general court martial. This being the case, the charges and allied documents including sworn statements of witnesses, summary of evidence, documentary exhibits, and recommendations go to the Staff Judge Advocate of the commander exercising general court martial jurisdiction, who thoroughly reviews the case and advises his commander of the action he should take.[10] If the allegations are of such serious nature that the commander exercising general court martial jurisdiction feels that reference to trial by general court martial should be considered, an officer is appointed to formally investigate the charges pursuant to Article 32 of the Uniform Code of Military Justice. Charges cannot be referred for trial, however, unless the Staff Judge Advocate can certify, considering the report of the investigating officer and his recommendations, that the specification states an offense and the evidence is legally sufficient to make out a prima facie case as to each element. The comparable civilian procedure is issuance of a warrant of arrest, commissioner's hearing and grand jury action.[11]

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2. Act of June 25, 1948, 62 Stat. 1014.
3. ACM S-6781, *Bruneau*, 12 CMR 718; *U. S.* v. *Keith*, (No. 503), 1 USCMA 493; *U.S.* v. *Gilbertson*, (No. 318), 1 USCMA 465; *U.S.* v. *Berry*, (No. 69), 1 USCMA 235.
4. *U.S.* v. *Clay*, 1 USCMA 74.
5. Art. 2, UCMJ.
6. See Ops. JAG, Army (1912) 482 concerning informal accusation or complaint by a person not subject to military jurisdiction.
7. Par. 29b, MCM, 1951.
8. Par. 29b, MCM, 1951.
9. Rule 4, Federal Rules of Criminal Procedure. It is interesting to note that no such preliminary inquiry is required by this rule as is required in military law. A sworn complaint is sufficient for issuance of a warrant of arrest.
10. Pars. 32, 33, MCM, 1951.
11. Rules 5 and 6, Federal Rules of Criminal Procedure.

The pretrial investigation conducted pursuant to Article 32 has a comparable step in civilian procedure, the preliminary hearing and the grand jury action.[12]

It is interesting to note that in military procedure at the pretrial investigation, an accused is entitled to military counsel at no expense to himself, to present his own witnesses and to cross-examine government witnesses. Compare the right of a civilian accused, who, although entitled to present his case in a preliminary hearing and to cross-examine witnesses,[13] must furnish counsel at his own expense. Also no formal and complete summary of the evidence heard by the examining magistrate supports his action in holding over an accused for grand jury action or accompanies the record as in military procedure. Also compare the right of the civilian defendant under Rule 6, Federal Rules of Criminal Procedure, which authorizes only the presence of attorneys for the Government, witness under examination, interpreter if needed, and stenographer, in grand jury sessions.

The investigating officer makes his report in which he can recommend dismissal, trial by a lower court or referral to trial by general court martial. For the purpose of this comparison, let us assume that the investigating officer recommends trial by general court. The case is then referred to a court composed almost entirely of senior officers (or one third enlisted men if the accused so requests) serving in a capacity comparable to a jury, headed by a law officer, an experienced lawyer who is also certified as competent to perform such duties by The Judge Advocate General of the service, and whose position is comparable to that of a federal district judge. He is the directing authority of the trial.[14] A further matter of interest is the fact that counsel, in all cases an attorney who is certified as competent to perform the duties of defense counsel by The Judge Advocate General of the service, is furnished the accused free of charge.

A review of cases decided by the United States Court of Military Appeals and by boards of review shows clearly that trial procedure in a military court is identical to that prevailing in a Federal District Court. Also of interest, statistics wise, is the fact that in 4 per cent of the general court martial cases in the Air Force tried during fiscal year 1956, the accused was acquitted; in 17 per cent of those cases, the accused received a sentence which did not involve punitive discharge or confinement for one year or more.

The Accused Is Convicted . . . *His Rights on Appeal*

To carry out my comparison, let us assume that the accused is convicted and sentenced to a punitive discharge and confinement in excess of one year. He is furnished a verbatim record free of charge, and appellate steps then begin. A lawyer in the office of the Staff Judge Advocate thoroughly reviews the case for error and sufficiency of evidence, also with a view toward clemency action. The record of trial, the written review, and the recommendations of the reviewing officer are taken to the commander who convened the court and who can approve, disapprove or modify the sentence, in addition to exercising the power to grant clemency. This constitutes the first appellate step.

If the sentence as approved includes a punitive discharge or confinement for one year or more, the record goes forward to a board of review, sitting in the Office of The Judge Advocate General, composed of three experienced senior military attorneys, who thoroughly review the case without petition from the accused, and who have the power to weigh the evidence, judge the credibility of witnesses and determine controverted questions of fact, a power unique in appellate procedure. Also during this second appellate step, the accused is entitled to the services of experienced appellate attorneys at no expense to himself, attorneys who are authorized to present briefs, and oral arguments, precisely as in the federal Court of Appeals.

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If his conviction is sustained by the board of review, notice of such action is served upon him. Within thirty days after service of this notice he may indicate his intention to petition the United States Court of Military Appeals for a review of his case. This notice can take the form of a letter dropped into a mailbox, a letter placed in official military channels, a statement to his counsel, or completion of a form given him at the time of service of the action of the board of review. At the time he takes action to transmit his desire to appeal, his right to petition the court accrues, and he is again entitled to appellate counsel at government expense to represent him before the supreme court of the military, the United States Court of Military Appeals. This is his third appellate step. Contrast his appellate rights with the appellate rights of a civilian defendant. Contrast also the mentioned thirty-day period with the period allowed a civilian defendant

12. *United States* v. *Lee*, 1 USCMA 212, 2 CMR 118.
13. Rule 5(c), Federal Rules of Criminal Procedure.
14. *U.S.* v. *Blankenship*, 7 USCMA 228, 22 CMR 118; *U.S.* v. *Berry*, 1 USCMA, 2 CMR 141.

under Rule 37 (a) (2), Federal Rules of Criminal Procedure, which requires that an appeal be perfected within ten days from the final order. Consider also the appellate steps in civilian courts where a defendant is allowed normally one appellate review upon the law of the case, and at considerable expense to himself for attorney fees, transcripts, filing fees and the like.

When these appellate steps have been finished, the military procedure is not yet complete. After final action by the board of review or the United States Court of Military Appeals as the case may be, the record is examined in the Office of The Judge Advocate General for possible clemency action. The accused must also be considered for clemency within six months after confinement and each year thereafter during his confinement. Contrast these several opportunities for clemency afforded a military accused with the one opportunity afforded a civilian defendant by reference of his case to a busy probation officer in a Federal District Court.

A further point that may be of considerable interest is the fact that this military appellate procedure is not limited to those accused individuals who plead not guilty at trial level and require the government to prove its case. The same rights and appellate steps are accorded an accused who pleads guilty and offers no evidence in his behalf.

How can it be denied that such a system is unnecessarily time consuming and an open invitation to frivolous appeals? Why should not action be taken to reduce appeals to justifiable bounds? Certainly the ordinary taxpayer who bears the financial burden would be appreciative.

A Military Lawyer . . . *Still a Lawyer*

Let us examine point by point some of the recommendations attacked by Mr. Walsh as evidencing a desire to return to what he chooses to call "drumhead justice". The premise he quoted from an early United States Court of Military Appeals case authored by the late Judge Paul W. Brosman[15] has been freely accepted by the military legal departments and is under no attack from any source. Neither is any determined effort being made to do away with the basic provisions of the Uniform Code of Military Justice. The recommendations under attack have been presented in the honest and sincere belief that acceptance will result in a less cumbersome and more efficient system of military justice which retains the necessary safeguards of basic human rights. Remember also, that a lawyer when he dons a uniform does not retire quietly from the legal profession. Those who formulated these recommendations remain first and foremost lawyers whose training, experience and ethical standards require that they consider human justice above all else.

Mr. Walsh implies that the Judge Advocates General should have limited these recommendations to procedural changes in the law, also that the United States Court of Military Appeals felt and observed such a limitation.[16]

The implication that the United States Court of Military Appeals felt limited to recommending such procedural changes is completely erroneous. I quote from the Annual Report of the United States Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Treasury for the period January 1, 1954, to December 31, 1954, at page 14:

> The judges of the court believe that Congress, when it enacted the Code placed upon them at least two fundamental duties. The first, to require the trial of cases within the framework of the Uniform Code of Military Justice. The second, and the one of prime importance for this report, to advise Congress on the ways and means by which the Uniform Code of Military Justice could be improved, without taking away from an accused any substantial right which has been granted to him. We, therefore, do not set out in this report our reasons for not joining those members of the Code Committee who seek substantive changes *which we believe to be unnecessarily hostile to the purposes and intent of the Uniform Code.* [Italics added.]

The Court members do not disagree with the changes recommended simply because they are substantive in nature; they disagree only with those which they consider hostile to the purposes and intent of the Code. To be considered "hostile", such changes do not necessarily have to affect the rights of an individual.

I must admit that acceptance of many of the recommendations would effect substantive changes in the Code; but why should recommended changes to any form of judicial system be limited to mere procedural changes? A study of the civilian system of criminal jurisprudence will show that it has reached its present stage of refinement only through numerous substantive changes over a period of centuries. Only a conclusion that the substantive law of the Uniform Code, experimented with in its original form for almost six years, is perfect in nature and absolutely in accord with the basic principles of human justice, can limit us to procedural changes. Certainly that premise is untenable; observe the tremendous volumes of legislation, amendatory in nature, which bear witness to the fact that even the simplest laws later require substantive change.

Mr. Walsh, however, goes further and states that these proposals would materially reduce the present rights accorded an accused in a military trial. Let us examine, therefore, the present rights of an accused serviceman. The United States Court of Military Appeals, speaking

(Continued on page 849)

15. Judge Brosman: "We believe Congress intended insofar as reasonably possible, to place military justice on the same plane as civilian justice and to free those accused by the military from certain vices which infested the old system."

16. Mr. Walsh: "Two years ago the Court of Military Appeals and the Judge Advocates General agreed on seventeen amendments which would save time and money and increase the informal disciplinary powers of commanders. The Court, in the last year's report, again recommended these changes. . . . The Armed Services went further, however, and insisted on substantive revisions in the Code, rather than mere procedural changes."

The Duties of the Profession:

What the Organized Bar Owes to the Public

by Jack Pope • *Judge of the Court of Civil Appeals (San Antonio, Texas)*

The public often finds it difficult to understand some of the attitudes and actions of the legal profession. What lawyer has not been asked, "How can you a defend a man that you know is guilty?" And in an age of science, men and women, brought up almost to revere the scientific method, are apt to be puzzled, perhaps a little impatient, with the empirical, inexact methods of the common law, many of which have taken centuries to develop. Judge Pope makes the point that the Bar owes it to the public to explain itself and its traditions, traditions, after all, that are the bed rock foundation upon which our liberties rest. The article is taken from an address delivered before the Nueces County Bar Association last January.

Governments are ruled either by law or by men. The free nations of today's world are those which are governed by laws made by the people; the slave states are those in which men impose their own ideas upon the people. In America, where we have enthroned human rights in constitutions and stare decisis, the laws of our land belong to the whole public. In such a nation every individual is a part of his government. Government as we know it is non-existent without law. Government, as we practice it, is non-existent without the citizen. Government, law and the citizen are indispensable to each other. In addressing professional men, I am speaking to a group who, by the very nature of their calling, possess an understanding and a knowledge about government and law which most citizens are not privileged to share. Lawyers are not only citizens, but as members of an ancient and noble profession, they are also professional citizens.

A profession is something more than a business or vocation. A profession deserving of the title embraces a body of persons who are learned. It contemplates further that its members are bound by a special code of conduct. That code of conduct requires that personal gain must often be subordinated to the public good. Hence, our conduct imposes duties to ourselves, to our clients and to the public. Let us examine that duty to the public . . . a public who actually owns the laws of which you and I are mere ministering servants. What may the public expect as its fair share of the law, primarily at our hands?

The public may first expect that our members be skilled concerning the dynamic laws of our expanding society. There is probably a general feeling that the members of the American Bar possess the necessary intellectual attainments, and that we pursue our services with sufficient expertness. Certainly the hundreds of legal institutes which have been conducted during the past fifteen years should have filled our filing cabinets with printed material on scores of legal subjects, which, if we will but read it, should furnish us a continuing course of professional education. Hardly a month passes but some bar association, law school, foundation, or institute sponsors a short course at which we can hear the finest lecturers who willingly deliver learned papers, with no reward but the professional gratitude of their fellows.

The public may next expect that our members conform to a code of ethics. The same public who owns the laws of our land also has an interest in the ethics of those who practice the law. It is not my purpose to preach, and I shall therefore assume that all of us know and understand the code of our profession, and that we often re-examine those principles. I would speak about another matter.

The bar associations of America have miserably failed in getting over to the general public the extreme importance to them of some of our misunderstood canons. Our failure to explain the purpose of our mission has ignorantly resulted in criticism of high-minded and courageous members of the Bench and Bar. Let me illustrate how narrow is

the line between right and wrong. Recently a preacher in a rural area remarked to me how good his church members had been to him during Christmas. He said that they actually practiced brotherly love and that his house was full of hams, cartons of canned goods and deer meat. He was aglow with the warmth of good will toward men. I agreed that it was wonderful for him, but told him that if my friends gave me hams, deer meat and canned goods instead of brotherly love, it would be considered crookedness. He looked at me in sharp surprise. He could not understand at first. Then he admitted that the same conduct may be Christianity when done for a preacher but may be crookedness when done for a judge.

Requests come to every judge from time to time to engage in some worthy project, such as soliciting funds for the Y.M.C.A., or sustaining memberships for the Boy Scouts, or funds for the Red Cross or United Fund, or Boys' Clubs. I know persons, excellent citizens, who have been highly offended by judges who refuse to solicit funds, as they must refuse; for judges are admonished not to make solicitations for any cause however worthy. I find it difficult to explain this to people. They see the worthy cause, but the canon is written because a judge may either knowingly or ignorantly solicit funds from someone who has or might have a case before the judge. Judges do not ask people for money, but the public often does not understand.

Worthy citizenship programs admonish people to practice citizenship. Write your public officials! They work for you! Phone them! Talk to them! Be heard! I agree that those are all fine symbols of good citizenship. I once had a college student write and advise me on how to decide the *Tidelands Case* when it came into my court. Last month I received a lengthy personal letter telling me how to decide a case that had racial problems. We file such letters with the papers in the case. I have had people call me to state the characteristic "hypothetical case". Such folksy conversations in advance of trial to pump up the judge are not often viewed with a wide-gauged understanding by the adversary.

Opinions About Lawyers . . . *Complimentary, Damning*

One further illustration: Several years ago, the State Bar of Texas conducted a survey of public opinion about lawyers. It was both complimentary and damning. One thing revealed was that 56 per cent of the people criticized lawyers for representing a person who is probably guilty. Measured by popular belief, that is a failing of our profession. But measured by our professional standards, it is a modern display of the courage that has preserved not only our profession, but our government in times of crisis. Why is it that a doctor can go out and sew up a wounded bank robber, and be applauded as an angel of mercy because his noble oath would not permit him to watch the culprit bleed to death? That same felon when represented by a lawyer, with an equally noble oath and who also wishes to save the same culprit's life, is treated as a colleague of the devil. This is because we have not interpreted to the public that our canons are really their cannons and are for their protection. In some nations a Bar's duty is to explain to the persons why they should not protest a conviction at the hands of the state. There are entire continents where the Bar works for one side only, and accusation is equivalent to conviction. The state can do no wrong in slave states with a subservient Bar.

As Holmes said, a page of history is better than a volume of logic. We have had our witchcraft trials. England had its Bloody Assizes under Judge Jeffreys who, as Macaulay has recorded, on one circuit, judicially murdered 320 persons. Many of them were innocent, all of them were political opponents, few of them had lawyers. The Christian martyrs had no lawyers. Jesus had no representation, and three times He pleaded the fifth amendment on His own behalf for the Bible says: "Jesus answered nothing."

The heinousness of a crime may sometimes, according to scientists, be the best reason that the man is not responsible. But it takes courage to represent unpopular causes. When members of the Bar are ruled by fear of criticism, they have then lost their strength. At least the whole story should be told so the right punishment should be assessed. That full story may even increase it. Certainly some reliance should be rested on the judgment of the jury.

Already I fear that some lawyers are fearful of taking loyalty cases because of the fear that they may, by association, be treated as traitors. We have just passed through an era when suspicion surrounded courageous men of the Bar who represented those who dissent, yes, those who are wrong. For a lawyer to defend an unpopular cause, he often pays a severe price. One of those prices should not be the disrespect of the more timid members of the Bar. If those men are willing to fight in the front line trenches for the unpopular client to preserve to everyone the right to counsel, then the Bar should do something better in the way of informing the public that the Bar's insistence upon the right to representation is asserted on behalf of every citizen who potentially may be charged falsely with an unpopular offense. The American Bar Association in 1953 adopted a declaration of principles. In part it provided:

> The right of defendants to the benefit of assistance of counsel and the duty of the Bar to provide such aid, even to the most unpopular defendants, involves public acceptance of the correlative right of a lawyer to represent and defend, in accordance with the standards of the legal profession, any client without being penalized by having imputed to him his client's reputation, views or character.
>
> The Association will support any lawyer against criticism or attack in connection with such representation when . . . he has behaved in accordance with the standards of the Bar.

The public is entitled to this meas-

ure of courage. When this Bar or any other Bar loses that courage, propaganda will replace the law; clamor will displace justice, and justice will be measured by the mob rather than by proof of the facts.

We could go down the code of ethics, item by item, hammered out from the days of Cicero up to this minute. They make sense to students of history, but every generation must learn that history again. We as lawyers are not interpreting to the public their own and vital interest in a firm adherence to a code that is often unpopular, though right.

What else do we as members of the Bar owe the public? We may divide the public into several groups. We shall start with the well-informed, the educated, the intellectual. Even those persons forget that government and law are inseparable. Even they do not always know that law, in a society which tries to preserve a maximum of individual rights, merely seeks to set minimum standards for moral behavior rather than maximum standards. That is the reason there will probably always be a need for another law. As people and businesses prove they are unworthy of self-policing, then the law will move in. Persons do not understand that laws, being general, are concerned with the external conduct of man measured by a generic or "reasonable" man; whereas morals are concerned with the subjective intention of men.

The Legal Method . . . *Difficult To Explain*

As a Bar, we have failed to interpret to the public our methods in administering justice. Physicians, of course, do not advertise. But their profession is fortunate in having scores of pharmaceutical companies, who explain to the public the glamour or false hope of the latest scientific research. I do not criticize this favorable indirect advertising. I think it is good. The point is that the whole public understands something about scientific research and, because it is understood, it is popular. Who understands the legal method? A scientist may experiment with successive litters of rats or flies, or guinea pigs and reach conclusions. Can a lawyer, working with a domestic relations matter, or a mental disease case, or an inheritance matter, experiment with successive generations of humans? I do not recommend the experimental method in domestic relations cases. Suppose a lawyer should suggest a scientific experiment with miscegenation for the next three hundred years! The idea is ridiculous. The difference in problems compels a difference in methods. Science is at its best with inert matter and natural science. When it deals with life, it has produced no greater success than those of us who work with it daily. We use common law methods and the historical approach because that is the closest thing we have to an experimental example. Our data are slow to develop.

Scientific success depends upon the extent that it can control the experiment. Lawyers take the facts as they find them. Scientists create a negative or artificial environment. Lawyers must consider the entire environment of a complex society. Natural science has special instruments. Lawyers work with the tools of the intellect. The natural scientist is outside his experiment, say looking at a peanut through a microscope. Few emotions become involved in such a practice. The lawyer, as the observer, is a part of the very human material with which he works. Induction is the star in the backfield of the scientist. Deduction is often the best that a lawyer can employ. The scientist seeks for the "is"; the lawyer, more often, for the "ought". The scientist has a Bureau of Standards with measuring devices gauged to one ten-millionth of a unit. The best we can find is a Supreme Court. We may know that Halley's Comet will return, but how the ordinary prudent man will react, we cannot prophesy, nor can the astronomer. A tolerant public will wait for years while science pursues an important research problem

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and applaud them all the while, but a critical public will clamor for a prompt judgment, even a wrong one, in the courthouse, perhaps on a matter concerning the same research.

Our problems are the problems of life and the whole society. Our methods are the best that have been devised or yet learned. One thousand years of freedom recommended the methods. As I say, these are matters that even our most intelligent people do not understand because we have not taken the time to make them known. So far as I have been able to discover, no one anywhere has ever seriously undertaken to make these things known to the thinking members of our public.

What else do we owe the public? Take, for example, the Nueces County Bar Association, a typical American bar association. It is neither a large nor a small Bar. Its members practice all kinds of law and possess a variety of skills. It has earned its fair share of state and national honors as an association, and has, on occasion, contributed more than its share to the public good. In my opinion, every bar association in America the size of the Nueces County Bar should, as standard pro-

cedures, furnish certain services to its members and the public. It should have a full-time professional bar secretary. It should have general supervision over a complete research law library. It should furnish to the general public an effective lawyer reference service. It should afford legal aid to persons in need. It should lend its influence to needed reforms.

If the public owns the law under our system of government by law, certainly all the public should have ways and means to learn about those matters that concern them. In the same survey of public opinion, already mentioned, we learned that only four out of every ten persons have ever hired a lawyer. It well may be that the other six did not need a lawyer, but most persons deal in property, have personal problems about which the law is concerned, and most persons have had close relatives who died leaving problems of a legal nature. Most of the folklore about lawyers is not complimentary. People are wont to transfer the traits of the client to the lawyer. Myths of generally exorbitant fees develop out of the rare fat fee. Whether we like it or not, many persons, for lack of correct information, fear lawyers. Consequently, as the survey shows, the majority of the public get their legal advice from a notary, well-intentioned friends or a bartender. Whereas, everyone has a doctor, everyone does not have a lawyer. And when a citizen needs a lawyer, often he knows not where to turn. Every Bar should afford the public an adequate lawyer-reference service. This is not charity; this is a means to guide persons who can afford a fee, but are unacquainted with lawyers. This service properly introduces the public to the lawyers and at the same time, provides additional remuneration to the lawyer.

And what about the poor? I commenced the practice of law in a lawyer's office here in Corpus Christi, and after only a few days in that office, that lawyer said to me: "No man ever walked out of my office because he was poor." I saw him chase many persons from his office, but none because he was poor. I think he spoke the sentiments of the Bar.

The amount of money involved, be it great or small, should not determine the case. The amount of money involved should not determine the care, or lack of it, with which a case is considered. Who, therefore, can say that the small cause is unimportant? All persons should have access to and advice about the laws of our land, for those laws are their laws governing their land. A too-common mistake has been to make legal aid the duty of young lawyers. In my opinion, those lawyers who have been most rewarded by our profession very well may be the ones who owe the most to the whole public through this satisfying service.

Improvements in the administration of justice receive their greatest impetus from and find their strongest voice in bar associations. To improve is not to crusade. We need only to keep up the work. We work daily with the law. We read extensively in a multitude of books. We find that great minds have been addressed to great problems. Those thoughts are preserved for us and guide us in our analysis and thinking. To those thoughts we each add our bit by way of criticism, improvement, or correction. Stare decisis is applied history and for the most part, I believe the public is satisfied with the substantive law. At least I do not hear too much general criticism about it. Even the adjective law, when explained, is generally approved by the public. They understand, when it is explained, that good reasons support our rules of evidence, our adversary theory, our practice of cross-examination, and the use of the other tools by which we isolate the real from the supposed.

But we do hear criticism. It is often loud and close at home. Sad also, it is often true. The kind of criticism we hear comes from a public that is as qualified as we are to judge. The complaints are about delays, postponements, false starts, procrastination, justice delayed. Most parties, and witnesses, I find, are big enough to take a defeat at the hands of judge or jury. Few persons, I find, are big enough to face, without complaint, the frustration of having a story to tell and no opportunity to tell it. Here, in my opinion, is the heart of every criticism the public may lay at our door. We cannot run from it. There is no place to hide. We would do well, in this area, not to interpret but to improve.

Bar associations, for the most part, are the agencies which have given us our improvements in the law. We now have improved rules of civil procedure, proceedings for declaratory judgments, summary judgments, pretrial hearings. We have just completed a new probate code and a corporation code. We hear no further complaints on the matters, for those improvements have closed the mouth of the critics. But in other fields, the criticism rages on, and it will continue. It will continue until we re-write, not the substantive law of the criminal branch, but the procedural rules. It will continue until we redistrict so the crowded courts of some parts of Texas will be relieved by courts which at the same time operate at a standstill. It will continue until judges administer their own dockets by studying those dockets, dismissing old cases for nonprosecution, require written motions for continuance, hold court regularly and uninterruptedly. It will continue until judges become students of the Minimum Standards of Judicial Administration as outlined by Chief Justice Vanderbilt. It will continue until we have records which show statistically to each judge each year how much he is turning out in the way of non-jury trial, jury trials and opinions.

The bar associations have generously contributed to the progress of jurisprudence in too many ways to mention. I am confident that the Bar is capable of setting in motion the steps which can realize any one of these rather ambitious undertakings. There is much to be done. The place to begin is here. The time is now.

The Labor Union:

Public Utility of Labor Relations

by **Mathew O. Tobriner** · *of the California Bar (San Francisco)*

Mr. Tobriner's thesis is that the labor union, under the National Labor Relations Act and the Labor Management Relations Act, has achieved a status akin to a public utility. In the process of evolution (or revolution) from a "conspiracy" at common law to its present role, the union has achieved respectability and responsibility, he writes, and at the same time the courts have come to exercise more and more control over the unions.

The American labor union has undergone a revolution in the past thirty years. Its characteristics have, indeed, changed so radically that it has become a sociological creature quite distinct from what it formerly was; it has grown into an institution, a new kind of public utility of labor relations.

The legal history of labor unions in the United States symbolizes this revolution. Originally treated by the courts as an unlawful conspiracy, whose members therefore suffered fine and imprisonment,[1] the union emerged into the light of legal recognition only after a long period of underground existence. But this recognition was at first formal only, since the use of the strike, the boycott or the picket line still involved legal penalties.[2]

Then, after suffering adverse restrictions under the Sherman Anti-trust Act,[3] the unions, in the 1930's and early 1940's made great legal gains: the picket line won constitutional protection as a form of free speech,[4] the secondary boycott[5] found sanctuary in the Norris-LaGuardia Act,[6] and the benign Wagner Act spread the warmth of a labor union sun.[7]

While the late forties and the Taft-Hartley Act brought some chilling restrictions,[8] the union continued to assume a more positive role. The key power which it had won in the thirties, and which expanded through the years, lay in the legal right to represent employees after winning a majority vote in elections conducted by the government itself. From criminal conspiracy the union had made the long climb to the role of government agent, a development peculiar to American political life because no such transformation took place in European economies.[9]

Of course, such a revolution inevitably metamorphosed the nature of the union. As to this, no better demonstration can be found that

1. Labor unions were once condemned as price-fixing "conspiracies". *The King* v. *Journeymen-Taylors*, 8 Mod. 10 (1721). *People* v. *Fisher*, 14 Wend. 9 (N.Y. 1815), held that it was criminal for laborers to combine to raise their wages. This decision is criticized in *Sayre* v. *Louisville Union Benevolent Association*, 62 Ky. 143 (1863), and distinguished with disapproval in *Commonwealth* v. *Hunt*, 4 Mets. 111 (Mass., 1842).

2. While *Commonwealth* v. *Hunt*, 4 Mets. 111 (1842), held the union was not unlawful *per se*, subsequent cases enjoined peaceful picketing and the secondary boycott; for example: *Sherry* v. *Perkins*, 147 Mass. 212 (1888); *People* v. *Wilgit*, 4 N.Y. Cr. Rep. 403 (1886); *People* v. *Kostka*, 4 N.Y. Cr. Rep. 429 (1886); *Johnson Harvester Company* v. *Meinhardt*, 20 How. Pr. 168, aff'd. 24 Hun. 489 (1880); *Toledo, Ann Arbor & North Michigan Railway Co.* v. *Pennsylvania Co.* (D.C. Ohio), 54 Fed. 730 (1893).

3. Under the Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. §1, *et seq.*, the Supreme Court sustained injunctions against alleged "unlawful" action in publishing an "unfair list" [*Loewe* v. *Lawlor*, 208 U.S. 274 (1908); *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418 (1911)], and brushed aside the apparently ameliorative Clayton Act of 1914, 38 Stat. 730, 15 U.S.C. §12, *et seq.* in *Duplex Printing Press Company* v. *Deering*, 254 U.S. 443 (1921).

4. *Carlson* v. *California*, 310 U.S. 106 (1940); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1947).

5. *Milk Wagon Drivers Union* v. *Lake Valley Farm Products*, 311 U.S. 91 (1940); *United States* v. *Hutcheson*, 312 U.S. 219 (1941); Forkosch, A Treatise on Labor Law (1953), pages 445-6.

6. Act of March 23, 1932, c. 90, 47 Stat. 70, 29 U.S.C. §101, *et seq.*, sustained as constitutional in *Lauf* v. *Skinner & Co.*, 303 U.S. 323 (1938); state prototype legislation upheld in *Senn* v. *Tile Layers Protective Union*, 301 U.S. 468 (1937).

7. Act of June 23, 1947, c. 120, 61 Stat. 136; Fed. Code Annotated, Title 29 §§141-188.

8. *Hughes* v. *Superior Court*, 339 U.S. 460 (1950); *Building Service Employees' International Union* v. *Gazzam*, 339 U.S. 532 (1950); *International Brotherhood of Teamsters* v. *Hauke*, 339 U.S. 490 (1950); *Gibboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

9. There is no provision in French law for "exclusive" representation by a union designated by a majority of the involved employees. Lorwin, *France*, in Galenson, Comparative Labor Movements, Prentice Hall (1952), page 378. The general provisions of the Italian constitution providing for "registration" of Italian unions has not at this date been implemented by specific statute, although it has been proposed to give "legal validity throughout the industry to collective agreements signed by representatives of over 50 per cent of the organized workers in the industry and of over half the recognized unions." Adams, *Italy*, *op. cit.*, page 453. Neither Great Britain nor the Scandinavian countries have legislation comparable to the Labor-Management Relations Act. Flanders, *Great Britain*, *op. cit.*; Galenson, *Scandinavia*, *op. cit.*, *supra*.

in the decisions of the courts; we propose to show that the union's form, composition, internal government, relationships with employers, and ties with its membership, have truly been revolutionized by law.

While originally the courts did not so much as recognize the legal existence of the union, they now, in most of the state jurisdictions of the United States, endow the union with the powerful right to bring suit as a plaintiff.[10] Since the famous *Coronado* decision,[11] the union has been suable in the federal courts as defendant. The Taft-Hartley Act provides the union may sue and be sued in the federal courts.[12] Hence the union has in substance become a legal entity, a status which has historically been regarded by lawyers and judges as a precious prerogative of a corporation, endowed only by charter from the sovereign.[13] From an amorphous unrecognized group the union has solidified into a legal person.

The union of the nineteenth and early twentieth century could admit or expel members as it pleased.[14] But the same process which transformed the untouchable group of workers into a respectable legal organization changed the union's powers over its own composition.

A generation ago, unionists were mainly proud craftsmen who, having spent years of apprenticeship to become journeymen, were quite unwilling to share their union with the less skilled. For example, the all-round electrician permitted the electrical worker on the production line only a membership in a "B" union; and this disdain prevailed among all AFL craft unions. The Teamsters Union would not take into membership "warehousemen", a category which today composes one of the largest fractions of the union's membership. Finally, a great many unions, including most of the railroad brotherhoods, excluded Negroes or relegated them to a "B" status in which they could not participate in bargaining or in the election of the white union's officers.[15]

But with the attainment of legal status, with the right to sue and to be sued, the union exposed itself to judicial scrutiny; indeed, the unions were sued, and sometimes by these excluded groups. The courts pried into the practices which previously had been voluntarily followed as custom or accomodation. The courts made rules which encased the newly won legal status of the union.

Even before the restrictions of the Taft-Hartley Act, the courts began to strip away the power to exclude workers from jobs as well as union membership. These courts ruled that the union which controlled the job could not deny the applicant who met reasonable qualifications for membership, both membership and job.[16] If the union wanted to insist upon a select and arbitrary composition, it could do so, but it would then be compelled to relinquish the enforcement of its closed shop. "A union occupies a *quasi-public* position similar to that of a *public service business* and it has corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations." (Italics ours.) In this language the California Supreme Court condemned a union which coupled its closed shop contract with its insistence that Negroes join a second-class union.[17]

As to unions whose members worked for employers engaged in interstate commerce, the Taft-Hartley Act forbade any discrimination in employment except for nonpayment of periodic membership dues or fees.[18]

Once the unions had won legal recognition, once they rested upon the right to enforce their contracts at law, all of the relationships involved in the union organization came before the courts and received a judicial twist. The union, no longer sovereign, became obligated to its own membership in a host of unexpected forms.

The union's government, previously assumed to be supreme and autonomous, presented to the courts an administration which they were willing to weigh and oftentimes to censure. Typical of such cases was the judicial denial of the power of an international president of a laundry workers union to expel a woman worker who became involved in a fight with a fellow member because, according to the court, the constitution did not explicitly describe such an offense as punishable in this manner.[19] In this fashion the courts passed on the kind of rules the union could make,[20] the

10. As Forkosch, A Treatise on Labor Law, points out, (page 327) unions at the common law "were treated as voluntary partnerships or clubs" and "could not therefore sue or be sued as an entity" except by statute, but "today, in the federal sphere, by decision and by statute, labor unions are persons and entities in the eyes of the law, while the common law rule holds good only for a few state jurisdictions where like decisions and statutes are not found" (page 329).

11. *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344 (1921). See also *Brown* v. *United States*, 276 U.S. 134 (1928); *Moffat Tunnel League* v. *United States*, 289 U.S. 113 (1928).

12. Section 301 of the Taft-Hartley Act provides suits may be brought against or by a "labor organization" for breach of a collective bargaining contract, and section 301(b) states that "Any such labor organization may sue or be sued as an entity . . ." with judgments "enforceable only against the organization as an entity and against its assets and shall not be enforceable against any individual member or his assets." See footnote 27 *infra*.

13. Warren, Corporate Advantages Without Incorporation (1928), page 648; Laski, *Personality of Associations*, 29 Harv. L. Rev. 404 (1916).

14. *Mayer* v. *Journeymen Stonecutters Assn.*, 47 N.J. Eq. 519, 20 Atl. 492; *Simons* v. *Berry* (App. Div. 1st Dept.), 210 App. Div. 90, 205 N.Y.S. 442 (1924); *Miller* v. *Ruehl* (Sup. Ct. Erie County), 166 Misc. 479, 2 N.Y.S. 2d 394 (1938); *Greenwood* v. *Sacramento Bldg. & Construction Trades Council*, 71 Cal. App. 159, 233 Pac. 823 (1925).

15. Even as late as 1946, fourteen American unions had constitutional provisions which specifically excluded Negroes from membership; nine permitted Negroes to join but gave them membership in powerless auxiliary organizations.

16. *Clark* v. *Curtis* (App. Div. 2d Dept. 1947), 273 App. Div. 797, 76 N.Y.S. 2d 3, aff'd 297 N.Y. 1014, 80 N.E. 2d 536; *James* v. *Marinship Corp.*, 25 Cal. 2d 721, 155 P. 2d 329 (1945).

17. *James* v. *Marinship Corp.*, *supra*, note 16.

18. 61 Stat. 141 (1947), 29 U.S.C. §158(b) 1; F.C.A. 29, §158(b) (1) forbids a union from restraining or coercing an employee in the exercise of the rights of employees set out in §7, although it is provided that the Act is not to "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." §8(b) (2) prohibits discrimination against an employee to whom union membership "has been denied or terminated on some ground other than" non-payment of dues or initiation fees.

19. *Smetherham* v. *Laundry Workers Union*, 44 Cal. App. 2d 131, 111 P. 2d 948 (1941).

20. *De Mille* v. *American Federation of Radio Artists*, 31 Calif. 2d 139, 187 P. 2d 769 (1947); *King* v. *Operating Engineers*, 114 Cal. App. 2d 159, 250 P. 2d 11 (1952).

procedure it should follow in making them,[21] the procedure permissible in disciplining members,[22] and the measure of the punishment.[23] Finally, the courts were, and are, properly intransigent in their demand that no member be suspended or expelled without notification of the charges of the alleged offense, an opportunity to be heard in self-defense, to cross-examine accusers and to refute evidence.[24]

If the internal management of the union thus largely fell under the supervision of the courts, the external field of union maneuver with and against employers fared no differently. We find the same imposition of legal restriction and judicial surveillance. When the union reaches an agreement with the employer, or when it cannot do so and turns to collective action, it may rely upon sanctioned rights, but to those rights there are attached corollary duties.

Twenty-five years ago an accord between employer and union on wages, hours and conditions found no more formal shape than an unenforcible gentlemen's agreement;[25] today the collective bargaining contract, usually a complex and lengthy instrument, is enforcible at common law in almost all state courts,[26] and, while enforcement under the Taft-Hartley Act has been beclouded by a presently divided Supreme Court,[27] the likelihood is that such a right will ultimately be established. The very scope of the current collective bargaining agreement would bewilder the trade union organizer of the twenties: the vast program for health and welfare and for pensions would strike him as fantastic; the elaborate provisions for vacation, holiday pay, work-week, overtime, seniority, recognition of picket lines, grievance, arbitration and duration would seem to him inappropriate, if not impossible. Yet almost all courts today would enforce any one or all of these clauses.

The contract of the employer engaged in interstate commerce is governed by the National Labor Relations Act, as amended. The union cannot force the employer to recognize or enter into a contract with it: If the employer in good faith doubts that the union represents a majority of the employees, it must stand an election.[28] And a collective bargaining contract, even when made, protects the union against rival union claims of representation only for the period and in the manner that the National Labor Relations Board determines.[29] Indeed, the life and effectiveness of the contract are conditioned by the Board.

Thus the union whose members engage in interstate business has won the right to a contract supervised by Government. The union even serves as a quasi-governmental body in administering the contract, enforcing it under the aegis of government.

Finally, when the union turns to economic battle with the employer, it finds its weapons accorded a new legal acceptance, but, again, at the price of judicial inspection and approval.

While picket line, secondary boycott and strike formerly fell under the absolute taboo of the doctrine of unlawful conspiracy,[30] today most courts permit these activities if, as and when the union's object

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21. *Riviello* v. *Journeymen Barbers H. & C. Intl. Union*, 109 Cal. App. 2d 123, 240 P. 2d 361 (1952); *Mandracio* v. *Bartenders Union*, 41 Calif. 2d 81, 256 P. 2d 927 (1953).

22. *Harris* v. *Marine Cooks & Stewards*, 116 Calif. App. 2d 759, 254 P. 2d 673 (1953); *Miller* v. *Intl. Union of Operating Engineers*, 118 Calif. App. 2d 66, 257 P. 2d 85 (1953); *McConville* v. *Milk Wagon Drivers Union*, 106 Calif. App. 696, 289 Pac. 852 (1930).

23. *Otto* v. *Journeyman Tailor's Protective & Benevolent Union*, 75 Cal. 308, 17 Pac. 217 (1938).

24. *Cason* v. *Glass Blowers' Assn.*, 37 Calif. 2d 134, 231 P. 2d 61 (1951).

25. Many courts held, and a scattered few persist in holding, that a collective bargaining contract is no more than a statement of usage to which few, if any, legal consequences attach. *Panhandle & S.F.R. Co.* v. *Wilson*, 55 S.W. 2d 216 (Tex. Civ. App. 1932); *United States Daily Corp.* v. *Nichols*, 32 F. 2d 834 (C.A.D.C. 1929); *Burnetto* v. *Marceline Coal Co.*, 180 Mo. 241, 79 S.W. 136 (1904). See Teller, LABOR DISPUTES AND COLLECTIVE BARGAINING, §159, page 483.

26. *Yazoo & M.V.R. Co.* v. *Sideboard*, 161 Misc. 4, 133 So. 669 (1931); *Schlesinger* v. *Quinto*, 201 App. Div. 487, 194 N.Y.S. 401 (1922); *Harper* v. *Local Union No. 520*, I.B.E.W., 48 S.W. 2d 1033 (Tex. Civ. App. 1932); *J. I. Case* v. *N.L.R.B.*, 321 U.S. 332, 335 (1944).

27. The Taft-Hartley Act provides, "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." Section 301(a).

As Manoff, LABOR RELATIONS LAW, (December, 1955), American Law Institute, states, "The effect of this section is still substantially undetermined. The Supreme Court has indicated that there is a division of opinion among the justices as to whether the section is substantive, i.e., creates a new Federal right for the enforcement of contracts regardless of (and perhaps superseding) their status under state law, or whether it is procedural only, merely providing an additional forum for the enforcement of state law. In addition, the case also leaves open the question to what extent, if any, assuming Section 301 to be substantive, that section supersedes state law. *Assn. of Westinghouse Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437 (1955), *cf. Philadelphia Marine Trade Assn.* v. *ILA*, 382 Pa. 326 (1955)," page 63.

28. *New Jersey Carpet Mills, Inc.* (1950), 92 NLRB 604; See also *Bailey Grocery Co.* (1952), 100 NLRB No. 94, and *NLRB* v. *Jackson Press, Inc.* (Calif. App. 7th, 1953), 201 F. 2d 541.

29. While the Board holds that a contract for a period of two years will bar a rival union's petition, since such a period is reasonable [*Reed Roller Bit Co.*, 72 NLRB 927 (1947)], longer contracts do not comprise a bar, except in unusual circumstances. [*California Walnut Growers Assn.*, 77 NLRB 756 (1948), upholding a three-year contract; *Allis-Chalmers Mfg. Co.*, 111 NLRB 389 (1955), upholding a five-year contract.]

30. *Pierce* v. *Stablemen's Union*, 156 Calif. 70, 103 Pac. 324 (1909); *Rosenberg* v. *Retail Clerk's Assn.*, 39 Calif. App. 67, 177 Pac. 864 (1918); *Moore* v. *Cooks & Stewards Union*, 39 Calif. App. 538, 179 Pac. 417 (1918).

is "lawful" because "reasonably relevant to working conditions and the purposes of collective bargaining".[31] Of course, such language leaves the courts the prerogative of deciding if and when the weapons are used for such "lawful" objectives. In a typical case, the court invoked the rule to restrain picketing of a supplier of milk to a peddler who was refused admission to the union;[32] in another, the court used the doctrine to condemn picketing an employer in order to get a contract covering store managers.[33] The application of the rule thus lies in the court's unlimited discretion; the discretion has given the courts a roving jurisdiction to pass upon the social advisability of the union's purposes. While the courts treat the union as an institution which may exercise powers within the orbit of institutional action, the courts fix the orbit.

Hence, in the treatment of the union's weapons of contest, we find, in summary, a parallel progression to that which has marked the course of the law regarding the union's status as an entity, its membership, its internal government, and its collective bargaining contracts. The union has won great rights, but it has been required to accept concomitant responsibilities; its functions are bilateral: the union has become a bureaucratic institution in a spider web of legal relationships, extending both toward it and from it.

And, of course, this legal metamorphosis of the union has necessarily changed its nature. It has changed the fundamental relationship of the union and its own member.

Before the NLRA, before legal sanction of the union itself, the bond between the union and the member was a voluntary one, based upon a willed allegiance. Today it is largely a legal and compulsive tie. The member is usually no passionate convert or zealous partisan but rather a consumer of benefits of union membership. He is a legal constituent of the union, to which he very often must belong; and he expects, in return, certain considerations which he would like to get at as cheap a price as possible.

The decade of the fifties, thus, witnesses a slackening of the ideological structure of the union simultaneously with the strengthening of its legal structure. The preambles of the union constitutions written a half century or so ago sound strange today. Their idealist commitments to a modified class warfare neither express the present membership's attitude toward the organization nor the purpose of the organization itself. The rugged antagonism of the old leaders toward "capitalists", their identity with their own "oppressed" class, lies as dead as the leaves of last year's spring. The drive of membership and leadership today is to identify with, rather than against, the middle class.

At the same time the union organization has become more concrete; the loose brotherhood, held together by the vibrant ties of idealism and struggle, has become legalistic. The easy relationship has been replaced by a new compulsion. The social arteries of the union have hardened as it has become older.

The union has attained status; it is now a sanctioned public institution. In the future we shall probably see less ideological drive of union members and more toughening of intra-union legal relationships, more tightening of extra-union rights and duties. The union will become more a legalistic formality and less a self-propelled "idealistic" group; it will take its place beside the business corporation and become more like it.

The union, as an aging legal body, will probably exhibit less and less political or ideological potency; it will, however, exert a fuller economic role in its present more secure status. But we need hardly fear that the union will develop into an ungoverned, uncontrolled monopoly; the legal rules which envelop and shape it make this impossible. The union is fast becoming a public utility of labor relations, circumvented at every point by the control of law.

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31. *McKay* v. *Retail Auto S.L. Union*, 16 Calif. 2d 311, 106 P. 2d 373 (1940); *C. S. Smith* v. *Lyons*, 16 Calif. 2d 389, 106 P. 2d 414 (1940); *E. H. Renzel Co.* v. *Warehousemen's Union*, 16 Calif. 2d 369 (1940); *Shafer* v. *Registered Pharmacists Union*, 16 Calif. 2d 379, 106 P. 2d 403 (1940).

32. *Bautista* v. *Jones*, 25 Calif. 2d 746, 155 P. 2d 343 (1945).

33. *Safeway Stores, Inc.* v. *Retail Clerks Intl. Assn.*, 41 Calif. 2d 567, 261 P. 2d 721 (1953).

A Unique Organization:

The Conference on Private International Law

by **Philip W. Amram** • *of the District of Columbia Bar*

Mr. Amram writes of his experiences as an observer at the Eighth Session of the Hague Conference on International Private Law, an organization that has been in existence more than sixty years and which occupies a unique place among lawyers' organizations since it has an official diplomatic status. Mr. Amram describes the Conference and its method of operation.

For the first time in history, the United States sent official observers[1] to the Hague Conference on International Private Law, *"Conférence de la Haye de Droit International Privé"*. Was it worthwhile and should we send observers to future conferences?

The excellent article by my friend Clifford J. Hynning on "International Law: Unification of Private Property Laws" in the December, 1956, issue of the JOURNAL points up the importance of this question.

History of the Conference . . . *A Curious Career*

The Hague Conference was first organized over sixty years ago in 1893. It has had a curious career.

The first session of 1893 was followed by a second session the following year, a third session in 1900 and a fourth session in 1904. Conventions were completed on two phases of family law. Inexplicably, the organization then went into complete relapse for twenty-one years. A fifth session was called in 1925 and a sixth in 1928. Then came a second relapse for another twenty-three years, until the seventh session was called in 1951.

In 1928 modifications of the 1902 and 1905 conventions on family law were proposed, but never acted upon. They too lay dormant for over twenty years.

In the interim between the sixth and seventh sessions came the impact of World War II, the creation of the United Nations and the appointment of the U.N. International Law Commission. Up to the present the U.N. Commission has concerned itself primarily with problems of public international law. As a result of these developments and to create some reasonable assurance against repetitions of the twenty-year relapses, the Conference has now been organized on a solid basis.

A permanent organization has been set up with a permanent secretariat at The Hague. There is a regular budget contributed by the member nations on the same formula as is used in the International Postal Union. The Netherlands Government, which provided much of the impetus for the revival of the Conference, pays most of the expenses of the meetings. In addition, the Netherlands Government has created a *Commission d'Etat*, which acts as a sort of Executive Committee between sessions. It meets regularly. Its functions are to supervise the secretariat and to work with special commissions which are set up, and with rapporteurs who are appointed to deal with special topics and prepare drafts of proposed Conventions.

This general scheme of organization follows the customary pattern. Translated into our titles, the spade work between meetings is done by a "reporter", with the help of the permanent paid staff, guided by a "special sub-committee" and supervised generally by an "executive committee". The preliminary drafts are circulated for comment and study to all members of the Conference in advance of the actual meetings.

The Conference has several special features which differentiate it

1. In addition to the writer, the observers were Joe C. Barrett, of Jonesboro, Arkansas, ex-President of the National Conference of Commissioners on Uniform State Laws; Professor Kurt Nadelmann of Harvard Law School and Professor Willis L. M. Reese of Columbia Law School.
The Eighth Session opened October 3, 1956, and ended October 24, 1956.

from any comparable group in the United States.

First—it is an official inter-governmental body. It is not a gathering of private lawyers and scholars. It operates on a full diplomatic basis. The only official language is French.[2]

Second—the Conference proposes and adopts only multilateral international conventions for formal submission to, and ratification by, the member governments, under their respective constitutional processes.

Third—the Conference has tended to interpret its mandate very narrowly, confining *droit international privé* to "conflict of laws". It does not aim for basic internal unification of domestic law among the members. It does not attempt to restate or codify the law. It does not draft uniform laws for domestic enactment. It proposes only multilateral international conventions.

United States Participation . . . *Status of the Observers*

The United States never has been a member of the Conference, and until this eighth session has never been invited to participate in any manner. I think it quite apparent why membership on our part is not at present possible and why we have not been invited to become a member of the Conference.

On the other hand, I think it is equally apparent that the world position of the United States now makes it imperative that we participate actively in all movements for codification, restatement, unification or improvement of international private law, in its broadest sense. Our friends in the free world abroad share this feeling.

Accordingly, when the time drew near for the eighth session, the Netherlands Government, through its Embassy in Washington, formally requested the presence of observers from the United States. Great Britain and Yugoslavia had sent observers to the seventh conference with such success that Great Britain elected to become a full member, and Yugoslavia sent observers again to the eighth session. Our Department of State did not feel that it could send true governmental representatives. Instead, it circulated the invitation of the Netherlands Government to bar associations and legal groups, asking them to nominate observers whom the Department would sponsor.

Although our credentials described each of us as "A Member of the United States Observer Delegation", we did not in fact represent the United States Government, but only the private bodies that had nominated us.[3] The American Bar Association sent in no nominations.

Our position as the representatives of private organizations at a full diplomatic conference was somewhat anomalous. Whereas other delegates could speak officially for their governments, we could speak for no government, neither state nor federal. The Department of State gave us the task of "providing to members of the Conference information and comments from the standpoint of American law and experience, on projects undertaken by the Conference". Since the United States was not expected to become a party to any of the conventions which might be drafted, any comments would necessarily be gratuitious. We could hardly participate actively in a debate on a document we had no intention of signing, even if drawn exactly as we wanted it. We therefore agreed among ourselves to be somewhat cautious in our direct participation in the discussions.

The warmth of our reception soon eliminated these doubts. All the delegates present[4] made it very clear that they were delighted that observers from the United States were present. They sought our comment on the problems under discussion. They wanted to be informed on our general approach to specific problems. They had general knowledge of our federal structure, our multiple jurisdictions and the extent of state sovereignty in matters of private law. But they were not all fully informed of the extent of our conflict of laws problems nor did they fully understand the effect of the "full faith and credit" clause. I found myself spending considerable time explaining our constitutional system.

The work of the Conference was divided into four commissions. This was an ideal arrangement, since it permitted the four observers to divide their work and participate in practically the entire program.

Uniform Legislation . . . *A United States Proposal*

Perhaps the most significant and most widely discussed item of United States participation was our submission of a memorandum proposing uniform legislation as a Conference technique, in addition to the historic method of the drafting of multilateral conventions. This memorandum was submitted in conformity with resolutions adopted by the American Branch of the International Law Association at its spring, 1956, meeting. Professor Nadelmann, on behalf of the International Law Association, led the observer delegation in this presentation.

We explained the experience in the United States and Canada with the use of uniform legislation in matters of private international law. The point was made that the Conference could simultaneously draft multilateral conventions and proposed uniform legislation. The latter would be available to those countries which could not, or did not wish to, become parties to the multilateral conventions (particularly federal states with federal problems). In addition, such drafts of uniform legislation could be considered and adopted by states which were not

2. A translator was available to translate into French for anyone who wished to speak in English. A Danish and a Norwegian delegate spoke in English throughout. However, a knowledge of French is essential, otherwise the discussion is lost.

3. Mr. Barrett was nominated by the National Conference of Commissioners on Uniform State Laws; Professor Nadelmann by the American Branch of the International Law Association; Professor Reese by the American Law Institute and The Association of the Bar of the City of New York; the writer by the District of Columbia Bar Association.

4. All nineteen member countries attended —Austria, Belgium, Denmark, Finland, France, Western Germany, Great Britain, Greece, Ireland, Italy, Japan, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and Turkey.

members of the Conference, but which would become aware of the work done by the Conference. This would largely aid in the basic program of unification of the legal rules.

The permanent staff of the Conference was vigorously opposed to the suggestion. A number of delegates took the same stand. The point was stressed that the Conference had a unique character. It was the only group which had a fully diplomatic status. Therefore, it necessarily confined itself to the drafting of multilateral conventions to be signed officially by the delegates of the member governments, subject to ratification. No other body performed this particular function although many other international bodies and legal societies were engaged in the drafting of both conventions and legislation on an unofficial basis. It was suggested that the Conference would lose its unique character if it did not confine itself to continuing its historic and unique practice.

The point was also made that, when the multilateral conventions are completed, any state may take the text and redraft it, with the same substance, for adoption as internal legislation.

No official action was taken, and there was no vote. However, I doubt that a program for the drafting of uniform legislation will currently be approved by the Conference.

The Eighth Session . . . *Many Accomplishments*

Applying the standards of similar bodies in the United States, the Conference accomplished a great deal. It completed and adopted four conventions. They covered:

(a) The conflict of laws rules applicable to the transfer of property in international sales of goods.

(b) The competence of a tribunal chosen by the parties in a contract for the international sale of goods, including the recognition and enforcement of judgments entered by such tribunal.

(c) The conflict of laws rules applicable to the duty of support of infants.

(d) The recognition and enforcement of judgments for such support.

In addition, the Conference reached policy decisions on the simplification of the burdensome "legalisation" of foreign documents, which was referred back to the staff for the preparation of a draft Convention.

The whole question of the Conventions on Family Law of 1902 and 1905 and the proposed revisions of 1928 was put on the agenda for the ninth session which will probably be held in 1960. Additional new topics are:

(a) Revision of the convention on guardianship of infants.

(b) The conflict of laws with respect to the form of wills.

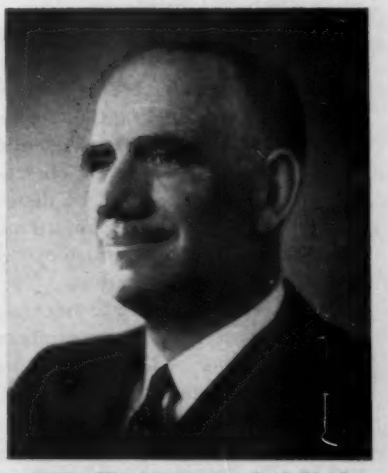
(c) The conflict of laws with respect to doctrines of agency in international contracts, with special reference to the rights and liabilities between the principal and the third party.

I regret that space will not permit me to discuss the large number of extraordinarily interesting questions raised by the four conventions adopted, particularly the radical shift from the civil law principle of "nationality" to the common law principle of "domicile" in family law.

On the basis of our experience at The Hague, we are unanimous in our feeling of the importance of United States participation in such meetings. If, for constitutional, diplomatic or policy reasons, the United States Government does not wish to become a formal party to such a Conference, it must certainly send observers. We can no more live in legal isolation from the rest of the free world than we can live in political isolation. With the enormous increase in international trade, in the international flow of goods and monies, and with the increase in the number of United States citizens living for long periods abroad, we cannot be separated from the law and the practice of other nations.

Most certainly there should be the maximum amount of uniformity, both in the rules of conflict of laws as well as in the domestic internal laws of the free world. If the United States cannot or does not wish to become a formal party to a treaty or international convention, dealing with a particular topic, our states and our Federal Government can adopt internal law to bring about the same rule.

But must we not participate in the drafting of the treaty or convention which other countries will adopt and which we will want to rewrite as internal legislation? If it contains provisions impossible of our acceptance, then we are powerless to adopt its rules through internal legislation at home. If, by participating in the drafting discussions, we can secure a final form of treaty or convention, the principles of which we can adopt by the passage of internal legislation, the practical result will be just as though the treaty or convention were adopted by all. All will have the same rule of law—some by treaty enactment; others by the enactment



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of local internal legislation.

The policy adopted by the Department of State in connection with The Hague Conference may be the means of eliminating the reserve which has marked the Department's position in the past. The "observers" who will be sent will be designated by private legal organizations and will not be official United States Government representatives. The United States as such will bear no responsibility for their comments and suggestions and will have no obligation to approve the results of their work. This will permit the fullest possible participation by our lawyers in this important work and, at the same time, will not subject the Department of State to any embarrassment.

I should like to offer some suggestions for the future:

1. Some thought should be given to the question of coverage of expenses of observers. If the program is to be one in the national interest, should the sponsoring organizations or the observers personally be asked to defray the entire expense? Would it not be appropriate for the United States Government to assume this responsibility?

2. Observer delegates should be appointed long enough in advance, and the basic Conference material should be distributed long enough in advance, so that the observers will have a chance to confer with one another, and, if desirable, with the Department of State, in order to be prepared fully for their actual work.

3. Our Association and other interested legal groups should urge the Department of State aggressively to continue the policy adopted for The Hague Conference. For example, preparation should begin immediately for United States observers at the proposed conference in 1958 on commercial arbitration.

4. Might it be desirable to organize a National Advisory Commission on international unification of private law with membership drawn from our Association, the American Law Institute, the American Association for the Comparative Study of Law, the National Conference of Commissioners on Uniform State Laws and the many other groups interested in phases of international private law? This Commission would be charged with seeing to it that the interests of the United States were properly represented at all international legal conferences in this field so that the principles and practice, under our system, may be presented and discussed before any definitive treaties, conventions or legislation will be drafted, approved and enacted by other nations.

At the opening I posed the question: Was our attendance worthwhile and should we send observers to future conferences? My answer is an enthusiastic "yes".

Examination for Criminal Investigators . . . .

The U. S. Civil Service Commission has announced an examination for Criminal Investigator for filling positions paying from $6,390 to $11,610 a year in the Department of the Air Force. The positions are located in Washington, D. C., throughout the United States, and in foreign countries.

No written test is required. To qualify, applicants must have had appropriate experience including at least three years of specialized experience in major investigative work. Pertinent college study, membership in the Bar of a state, territory, or the District of Columbia, or the possession of a certificate as a C.P.A. are acceptable toward meeting the general experience requirement. For these positions the Department of the Air Force will employ only men.

Applications will be accepted until further notice and must be filed with the Executive Secretary, Board of U. S. Civil Service Examiners, Bolling Air Force Base, Department of the Air Force, Washington 25, D. C.

Further information and application forms may be obtained from many post offices throughout the country or from the U. S. Civil Service Commission, Washington 25, D. C.

Readings in Legal Literature:

A Bibliographical Supplement

by William H. Davenport · *Chairman of the Department of English at the University of Southern California*

In October, 1955 (41 A.B.A.J. 939), I published an article on legal literature which concluded with a bibliography of reading in the field prepared by Riley Paul Burton, law librarian at the University of Southern California, and myself. The conclusion of the article hinted that it might "be possible to publish supplements from time to time". Following is just such a supplement, almost as long as the original list and arranged in the same categories for easy reference and comparison. Again I thank the many contributors who were prompted to send in material in answer to our printed request. More than ever am I convinced that the law-literature relationship is a fine and enduring one. Out of these articles and bibliographies and reader response will shortly come, if all goes well, an anthology of legal literature, which is now in an advanced prepublication stage.

William H. Davenport

I. Bibliographies and Lists of Readings

Armstrong, W. P. "Some Books Not Primarily for Lawyers," 33 A.B.A.J. 339 (1947).

Davenport, W. H. "Readings in Legal Literature," 41 A.B.A.J. 939 (1955).

Elihu Root Room, Harvard Law School Library: Suggested Reading Lists

No. 1, Biographies of the Justices of the United States Supreme Court, 1955.

No. 2, Articles on the Justices of the United States Supreme Court, 1955.

No. 3, Books Pertaining to the United States Supreme Court, 1956.

No. 4, Biographical Material on Famous Members of the Bar of the United States Supreme Court, 1956.

Smith, V. M. "Trials: Paper Bound Originals," 49 L. Lib. J. 267 (1956).

III. Relation of Law and Literature in General

Armstrong, W. P. "Statesmen, Lawyers and Books," 17 A.B.A.J. 465 (1931).

Arnold, W. R. "Law and Poetry," 1 Notre Dame Law. 77 (1926).

Beck, J. M. "Lawyers in Tudor Times," in *May It Please the Court.*

Birkett, Lord Justice "Law and Literature: The Equipment of the Lawyer," 36 A.B.A.J. 891 (1950).

Butler, C. C. "Laying Foundations for a Legal Career," 7 A.B.A.J. 539 (1921).

Duke, W. "The Law in Drama," 38 Jurid. Rev. 55 (1926).

Gottlieb, T. D. "Law and Lawyers in Quotations," 28 N.J.L.J. 38 (1905).

Llewellyn, K. N. "The Good, True, & Beautiful in Law," 9 U. Chi. L. Rev. 224.

Macmillan, H. P. "Law and Letters," 16 A.B.A.J. 1662 (1930).

Mencken, H. L. "American Law," in *Minority Report*

" " " "Mr. Justice Holmes," "The Criminal Law," in *Mencken Chrestomathy*

Palmer, B. W. "The Lawyer & the Poet, etc." 35 A.B.A.J. 375 (1949).

"Poetry and the Law," 67 Cent. L. J. 92; 31 N.J.L.J. 241 (1908).

"Practical Muse, The," 3 Can. B. Rev. 401 (1925).

Prince, E. M. "Lawyers in Literature," 6 Hastings Law J. 171.

Radin, M. "Hanged for a Rhyme," 19 Ill. L. Rev. 607 (1925).

Schary, Doré "As Others See Us," 31 Calif. St. B. J. 282 (1956).

Thomson, G. C. "A Bard in Law," 3 Can. B. Rev. 200 (1925).

Train, A. "Lawyer into Writer," Chap. 34 of *My Day in Court*

Williston, S. *Life and Law*

Wolfson, R. F. "Aesthetics in and About the Law," 33 Ky. L. J. 33 (1944).

IV. Studies of Famous Authors and Their Legal Knowledge

Barton, Sir D. P. — *Links Between Shakespeare and the Law* (1929).

Beck, J. M. — "Shakespeare and the Law," 15 A.B.A.J. 133 (1929).

Campbell, Lord — *Shakespeare's Legal Acquirements*, 1859.

Chapin, H. G. — "Law and Lawyers of Dickens," 31 N.J.L.J. 233 (1908).

Dobie, W. G. H. — "Law and Lawyers in the Waverly Novels," 32 Jurid. Rev. 244, 317 (1920).

Duke, W. — "Boswell Among the Lawyers," 38 Jurid. Rev. 341 (1926).

"Goethe as a Lawyer," 10 Can. B. Rev. 248 (1932).

Gray, W. F. — "New Light on James Boswell," 50 Jurid. Rev. 142 (1938).

Hackel, D. H. — "Dickens and the Law," 3 Bus. L. Rev. 150 (1956).

Henderson, J. H. — "Boswell and His Practice at the Bar," 17 Jurid. Rev. 105 (1905).

Herrington, W. S. — "The Legal Lore of Shakespeare," 3 Can. B. Rev. 537 (1925).

Hodgins, F. E. — "The Silver Spoon," 5 Can. B. Rev. 500 (1927). (Galsworthy)

Letts, M. — "Utterson et al.—Stevenson and the Law," 53 L. Soc. Gaz. 245 (1956).

Lyell, W. D. — "The Real Weir of Hermiston," 16 Jurid. Rev. 115 (1904).

McDonald, T. P. — "Sir Walter Scott's Fee Book," 62 Jurid. Rev. 288 (1951).

Munkman, J. — "Literature and the Law; Rider Haggard, etc." 105 L. J. 598 (1955).

Mure, A. — "Sir Walter Scott and the French Law, etc." 10 Jurid. Rev. 25 (1898).

Murray, J. — "Some Civil Cases of James Boswell," 52 Jurid. Rev. 222 (1940).

Phythian-Adams, W. J. — "The Corpse in the Cathedral," 58 Jurid. Rev. 37 (1946) (Dickens)

Pringle, P. — *Hue and Cry: The Story of Henry and John Fielding*, 1956.

Ramsey, J. — "Boswell's First Criminal Case," 50 Jurid. Rev. 315 (1938).

Roughead, W. — "Boswell's Queer Client," 43 Jurid. Rev. 30, 138 (1931).

" " — "A Note on Robert Fergusson," 30 Jurid. Rev. 99, 194 (1918).

Simpson, T. B. — "Boswell as an Advocate," 34 Jurid. Rev. 201 (1922).

Thomson, G. C. — "A Poet's Testament," 5 Can. B. Rev. 193 (1927). (Fergusson).

Vaughan, F. E. — "Dickens and His Lawyers, etc." 41 A.B.A.J. 595 (1955).

Watt, F. — "Samuel Warren," 30 Jurid. Rev. 85 (1918).

Windolph, F. L. — *Reflections of the Law in Literature*, 1956.

"Writers and the Law"
- I. Henry Fielding, 218 L.T. 343 (1954).
- II. Lord Clarendon, 219 L.T. 189 (1955).
- III. Sir Walter Scott, 219 L.T. 255 (1955).
- IV. Anthony Trollope, 220 L.T. 5 (1955).
- V. Charles Lamb, 221 L.T. 4 (1956).
- VI. Robert Louis Stevenson, 221 L.T. 255 (1956).
- VII. John Galsworthy, 222 L.T. 154 (1956).

V. The Writings of Lawyers and Judges as Literature: Examples and Criticism

Cowan, T. A., ed. — *The American Jurisprudence Reader* (1956).

Douglas, W. O. — *We the Judges*, 1956.

Frankfurter, F. — *Of Law and Men*, 1956.

Gerhart, E. C., ed. — *The Lawyer's Treasury* (1956).

Greenbaum, E. S. — "Lawyers Talk Too Much," 19 F.R.D. 217 (1956).

Hardy, G. W., Jr. — "Words for Lawyers," 27 Miss. L. J. 197 (1956).

Hays, R. C. — "Friend of the Court in San Quixote," 30 Cal. S. B. J. 396 (1955).

Holdsworth, W. S. — "Literature in Law Books," 24 Wash. U. L. Q. 153 (1954).

"Judgments as Literature," 105 L.J. 486, 805 (1955); 106 L.J. 518 (1956).

Lamm, H. — *Legal Philology*, 1923.

Littler, R. — "Legal Writing in Law Practice," 31 Cal. S. B. J. 28 (1956).

Marke, J., ed. — *The Holmes Reader*, 1955.

Megarry, R. E. — *Miscellany-at-Law*, 1955.

Miller, A. S. — "Some Remarks on Legal Writing," 18 Ga. B. J. 253 (1956).

" " " — "Statutory Language and the Purposive Use of Ambiguity," 42 Va. L. Rev. 23 (1956).

Pickering, H. G. — "On Learning To Write: Suggestions, etc." 41 A.B.A.J. 1121 (1955).

Pollack, E., ed. — *The Brandeis Reader*, 1956.

Rothe, B., ed. — *The Daniel Webster Reader*, 1956.

Surrency, E. C., ed. — *The Marshall Reader*, 1955.

VI. Autobiography, Biography, Memoirs

Belli, M. — *Ready for the Plaintiff* (1956).

Brown, C. G. — *You May Take the Witness* (1955).

Conrad, E. — *Mr. Seward for the Defense* (1956).

Dunham, A. & P. Kurland — *Mr. Justice* (1956).

Jackson, F. H. — *Simeon Eben Baldwin*, etc. (1955).

Mason, A. T. — *Harlan F. Stone: Pillar of the Law* (1956).

Morgan, D. G. — *Justice William Johnson, the First Dissenter* (1954).

Noble J. and B. Averbuch — *Never Plead Guilty* (1955) (Ehrlich)

Smith, C. P. — *James Wilson, Founding Father* (1956).

Ulman, J. N. — *A Judge Takes the Stand* (1933).

Wallace, R. — *Life and Limb* (1955) (Belli)

VII. Fiction

(A) Novels

Auchinloss, L. — *The Great World and Timothy Colt* (1956)

Botein, B. — *The Prosecutor* (1956)

Cecil, H. — *Friends at Court*

" " — *Brothers in Law*

Gehman, R. — *Murder in Paradise*

Levin, M. — *Compulsion*

Trollope, A. — *Phineas Redux*

Zola, E. — *J'accuse!*

(B) Short Stories, Selections, Anthologies

Apuleius, L.	*The Golden Ass*, Bk. III, Chaps. xii-xiii
Boccaccio, G.	*Decameron*, Day 8, Tale 5
Camus, A.	*The Stranger*, Part II, Chaps. 1-4
Coates, R.	*The Law*
De Maupassant, G.	*Hippolyte's Claim*
Dickens, C.	*To Be Taken with a Grain of Salt*
Duke, W.	"Wigs on the Green," 38 Jurid. Rev. 163 (1926).
Dunsany, Lord	*Two Bottles of Relish*
Faulkner, W.	*Knight's Gambit*
" "	*Smoke*
Galsworthy, J.	*The Juryman*
" "	*A Feud*
" "	*The First and the Last*
" "	*The Pack*
Herbert, A. P.	*Codd's Last Case*
Maugham, S.	*The Letter*
Parker, J. R.	*Attorneys at Law*
Rabelais, F.	*Gargantua and Pantagruel*, Book II, Chapters 10-13
Roughead, W.	"Lord Dunsinann's Spectacles," 38 Jurid. Rev. 225 (1926).
Starrett, V.	*The Eleventh Juror*

VIII. Drama

Aristophanes	*The Wasps*
Beaumont and Fletcher	*The Little French Lawyer*
Christie, A.	*Witness for the Prosecution*
Flavin, M.	*The Criminal Code*
Girardoux, J.	*Ondine*
Lawrence J. and R. Lee	*Inherit the Wind*
Massinger, P.	*The Old Law*
Middleton, T.	*The Phoenix*
Racine, J.	*Les Plaideurs*
Rice, E.	*Judgment Day*
Shakespeare, W.	*Measure for Measure*
Spender, S.	*Trial of a Judge*
Terence	*Phormio the Parasite*
Webster, J.	*The Devil's Law Case*

[Editor's Note: Dr. Davenport is now engaged in compiling an anthology of legal literature for the Macmillan Company, New York. It will appear in 1958.]

Tulane, University of Chicago Offer Taxation Programs for Members of the Bar

Two law schools are sponsoring conferences on taxation during the month of October. The University of Chicago's Tenth Annual Federal Tax Conference will open in Chicago on October 23; on the same day, the Seventh Annual Tulane Tax Institute will begin in New Orleans.

The Chicago program, which will be held at the University's campus in the Loop, will last three days. On Wednesday morning, October 23, the subject will be "Administrative Policy; Tax Fraud Problems". That afternoon, "Rulings; Accounting Problems" will be considered. The Thursday sessions will be devoted to "Corporations and Shareholders" and "Corporate Tax Problems". Friday's programs will consider "Estate and Executor Problems" and "Partnerships".

The Tulane institute will be held in New Orleans at the St. Charles Hotel, beginning Wednesday afternoon with a session on "Family and Business Problems". A specialized session on "Oil and Gas Problems" will be held on Thurday morning, to be followed by a session that afternoon devoted to "Current Problems in the General Field of Taxation". The Friday sessions will be devoted to "Corporations" and the institute will end on Saturday morning with discussions of "Multi-State Business Tax Problems", "Taxation of Securities Transactions" and "Deductions for Individual Taxpayers".

Registrations for the Chicago conference should be made with Eliezer Krumbein, University College, University of Chicago, 19 South LaSalle Street. The registration fee is $50.00. Information about hotel reservations can be obtained at the same address.

The registration fee for the Tulane institute is also $50.00. Advance registration should be made with Peter A. Firmin, Executive Secretary, Tulane Tax Institute, Tulane University, New Orleans, Louisiana.

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Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

Joseph Welles Henderson, 1890-1957

He was a former President of our Association, but much more than that—for he was everybody's friend. He conducted himself with dignity, which did not detract in any way from the warmth and friendliness of his character. His help to those who needed it was always ready and wholehearted. The names of those who were befriended by him are legion. With all his fine qualities, none were nearer the top than his loyalties and his patriotism.

As Chairman of his State Bar Association Committee on War Work he did not use high office to acquire assignment as an executive to direct others without himself laboring in the vineyard. We well remember the report of our Committee on War Work presented to the House of Delegates on August 25, 1943. It told of Joe Henderson's incomparable devotion in a difficult and unusual case in Philadelphia:

Jones was a sailor on a British battleship laid up for repairs in the Philadelphia Navy Yard. On the seventh day of December he married a sixteen-year-old Philadelphia girl. He was twenty-one. About a month and a half after the marriage it appeared that she was to have a baby. She informed Jones that she had had an affair with her next-door neighbor, who was in the American Army and that he was the father of the prospective child. She was in love with him but her mother objected to her marrying him. When Jones learned the facts, he realized he had been imposed upon and asked the chaplain of his ship what to do. The matter was referred to Mr. Henderson's committee and he took charge. First he sought in vain for assistance from the authorities in Maryland where Jones and his recent bride resided, thinking that they might take jurisdiction and annul the marriage. The next move was to seek annulment in Philadelphia. Written statements were procured from the girl and it was learned that the American soldier was willing to marry her. The rest we present in Joe Henderson's language:

"There then began a race against time, so that the proper parents would be on hand at the time of the arrival. The libel for annulment was filed before a very sympathetic judge, who did everything in his power to expedite the case. There was a master appointed whose usual fee was $100, but who agreed to serve for nothing. We in turn put up the fee which was necessary before he could be appointed, which fee was later returned to us less certain impounding.

"The master of the court approved the annulment. The court granted it. We had in the meantime many meetings with the young lady, had arranged for the blood test for her marriage to her future husband, and arranged for the waiving of the three-day period. The final decree and annulment was granted Tuesday, July 20. The soldier boy appeared here on Wednesday, July 21, to procure a marriage license. They were married. The child was due on the 27th day of July.

"This case was fraught with all kinds of difficulties. The young girl was a minor. So at every turn she had to be accompanied by a guardian. Her father and mother had been separated for some years. She had a sister. Her father eleven years ago took her younger sister with him. They have never been heard of since . . . .

"We have by this case I am sure established a most friendly relationship with our British friends. So far as I know it is the only international case so far handled by the War Work Committee."

How correct he was in his appraisal of the friendly relations fostered by his handling of this case is demonstrated by the following letter received by him from the captain of the young man's ship:

"I want to thank you most sincerely for all that you have done for the British Navy, myself as captain of a ship, and Able Seaman Jones. I realize how lucky it was for us that you handled the case and how generous you were in doing all the work free of charge. The Jones case was a nasty affair, and I am so delighted that you have smoothed it all out. I am really most grateful to you and I know Jones is too.

Thank you again for being so generous and public spirited."

The manner in which Joe Henderson took personal charge of this case and the determination with which he followed through is characteristic of the way he conducted himself throughout his life when called upon for help by those in need.

Editor to Readers

James P. Economos, Director of the Association's Traffic Court Program, has passed on to the Journal *the following news release from the Automobile Manufacturers Association, of Detroit. Mr. Economos said that he thought it was "worth a comment". We thought it was worth setting forth in full, so here it is:*

The Board of Directors of the Automobile Manufacturers Association today unanimously recommended to member companies that they take no part in automobile racing or other competitive events involving tests of speed and that they refrain from suggesting speed in passenger car advertising or publicity.

The Board voiced the desire of automobile manufacturers to "encourage owners and drivers to evaluate passenger cars in terms of useful power and ability to afford safe, reliable and comfortable transportation, rather than in terms of capacity for speed".

All volume producers of passenger automobiles in the United States are represented in the Automobile Manufacturers Association.

The resolution stated that the Association and the members of the Board "share the public interest in increasing the safety of highway travel".

"The manufacturers of automobiles", the resolution read, "have directed their efforts for many years toward developing and maintaining the performance characteristics of vehicles at levels consistent with highway conditions and the requirements of the using public."

Manufacturers can best serve the public by continuing these efforts, the document stated, "utilizing research and testing facilities, laboratories and engineering proving grounds to conduct tests under controlled and scientific conditions and standards."

The resolution recommended that member passenger car manufacturers:

1. Not participate in any public, competitive test of passenger cars involving or suggesting racing or speed, including acceleration tests.

2. Not encourage or assist employees, dealers or others, or furnish financial, engineering, manufacturing, advertising or public relations assistance in connection with any such event, directly or indirectly.

3. Not supply "pace cars" or "official cars" in connection with any such event.

4. Not advertise or publicize any such event or the results thereof, or assist and encourage others to do so.

5. Not advertise or publicize actual or comparative capabilities of passenger cars for speed, or specific engine size, torque, horsepower or ability to accelerate or perform, in any context that suggests speed.

The President's Page

(Continued from page 771)

proximately 3000 American lawyers who were guests of the English barristers on these memorable occasions. Words are inadequate to describe the interesting and informative speeches, the wonderful fellowship and tremendous inspirational character of these glorious evenings amid ancient surroundings which recalled the great men of the law who have lived and worked in the historic Inns.

Where to begin and where to end this short report upon such a meeting is indeed a major problem. Certain it is that no adequate report can be given in the space here available. Certain it is also that this great meeting gave us many ideas which throw new light upon the strengths and frailties of our system for the administration of justice. Not only our legal profession but the people of America will benefit immeasurably from this mutual exchange of information and experience. We came home better able to perform our public and professional duties and responsibilities because of what we learned about what the English have done, are doing and what they plan to do.

Over a long period of years we have had a most intimate and friendly relationship with the legal profession of England. The springs of friendship, already great, were replenished anew and multiplied a hundredfold by the personal contacts at this the largest international gathering of lawyers in world history. We earnestly hope that our visit will be an event of substantial and continuing importance not only to our profession but to all of our people, as the importance of this joint meeting is too broad to be limited by the interests of a profession.

We return to the United States with most pleasant memories of the grand, gracious and great people of England, and we earnestly hope that in the near future they can return our visit so that we may repay in part their many courtesies and their magnificent hospitality.

The Law Society of England and the General Council of the Bar and each member thereof are to be highly complimented for the very wonderful way in which they handled every phase of the arrangements. We shall always be thankful for all they did to make every phase of this meeting so productive and so happy for us all.

Our London Meeting:

An Englishman's Impressions

by Jonathan Stone

The following account of the Association's recent visit to London was written by a young Englishman whose summary gives an excellent picture of the highlights of the "invasion" of the United Kingdom by the lawyers of the United States. The October and November issues of the Journal will carry many of the addresses and other details of the 1957 Annual Meeting.

The 80th Annual Meeting of the American Bar Association opened as Big Ben struck eleven o'clock on Wednesday morning, July 24, and the Lord High Chancellor of Great Britain, Viscount Kilmuir, descended the steps of Westminster Hall, preceded by his Macebearer. A few moments earlier, the Law Officers of the Crown, the Senior and the Puisne Judges of the High Court in their magnificent black and scarlet robes, knee-breeches and hose, lace frills and full-bottomed wigs had taken their places and set the scene for the presentation of the Assembly to the Lord High Chancellor.

The Right Honorable Sir Reginald Manningham-Buller, Her Majesty's Attorney General and the only lawyer in England ever called "Mr. Attorney", welcomed the Assembly to Westminster Hall—"the workshop of the Law"—on behalf of the Bar: Mr. Ian D. Yeaman, President of the Law Society, delivered an address of welcome on behalf of the solicitors. The Lord Chancellor told the Assembly something of the historic associations which the law has with the great hall in which they were and how not so long ago all the King's Courts functioned there side by side without distinction. Mr. David F. Maxwell, President of the American Bar Association, and Chief Justice Warren addressed the Assembly and Attorney General Brownell conveyed a message of good will from President Eisenhower.

The Meeting was on, even for those who had been unfortunate not to secure a place in the historic hall, for the whole session had been relayed by closed-circuit television to a west-end cinema.

Between the Fourth Assembly Session on Wednesday morning and the Fifth Assembly Session on Friday afternoon, the schedule of events listed 150 functions or conferences of one sort or another, with luncheons and dress shows, teas and garden parties, cocktail parties and visits to newspapers and receptions and dinners, and so on.

On Wednesday evening was the first official reception—by the President and Council of the Law Society at the Law Society's Hall in Chancery Lane beside the Law Courts. The first of a series of dinners by the four Inns of Court (which are neither Inns nor Courts) on the same evening gave the invited members of the American Bar Association a glimpse of the ritual and environment in which the barrister-to-be is initiated within the fold of his Honorable Society.

Thursday morning saw the beginning of the Meeting's heaviest day. In addition to the many social events, there were joint sessions in various parts of London at which delegates discussed topics of interest mutual to lawyers on both sides of the Atlantic. An afternoon visit to the Marylebone Cricket Club at Lord's Ground—the headquarters of cricket in the British Empire—to watch the game provided greater problems and difficulties to the members of the Association than the mornings's legal wranglings. Again, dress shows, museum and art gallery visits, luncheons, teas, cocktails, receptions and dinners were held on Thursday all over London.

More joint and general sessions were conducted on Friday morning prior to the Fifth Assembly Session in the splendid modern Royal Festival Hall.

John Hay Whitney, the United States Ambassador to the Court of St. James, introduced to the Assembly Her Majesty's First Lord of the Treasury and Prime Minister the Rt. Hon. Harold Macmillan. Mr. Whitney spoke of his important task of interpretation of Britain's thoughts for the United States and of the

United States' thoughts for Britain, but from what he could see of the meeting, he felt that there was no doubt that the thoughts and desires of both nations showed complete identity—peace and good will. Though his arrival was but a few months ago, Mr. Whitney has already endeared himself to all those with whom he has come in contact and he received a tumultuous reception by the members of the Honorable Society of the Middle Temple when he was made a Bencher of that Inn last month.

When Mr. Macmillan spoke, he reiterated many of the sentiments of Mr. Whitney's speech, and in appealing for complete co-operation between the United States and Britain he said that the worst solitude is to be destitute of friendship. On talking of his parenthood—his mother was from the United States—Mr. Macmillan received applause from various sections of the Festival Hall when he mentioned the individual states from which his mother's family sprang.

Friday night saw three major receptions—by the Rt. Hon. The Lord Mayor and Corporation of London at the Guildhall, by the Chairman of the London County Council at County Hall and by the Lord High Chancellor in the Royal Gallery of the House of Lords. In a way, the setting at the Guildhall in the City provided the most impressive surroundings of the three. The Rt. Hon. Lord Mayor, Colonel Sir George James Cullum Welch, and the Lady Mayoress accompanied by the Sheriffs of the City of London and their ladies received their guests on the dais of the Guildhall. Splendid color was added to the evening by the Escort and Guard of the Company of Pikemen and Musketeers of the Honorable Artillery Company who were dressed in their traditional centuries old scarlet costumes.

A magnificent selection of the Mansion House plate and early charters and manuscripts from the Guildhall Museum was on display in the library and although during the blitz of 1940 almost utter destruction came to the Guildhall, the fine restoration work was completed in 1954 and now once again each year the Lord Mayor and the Sheriffs are elected by the Liverymen in the Common Hall.

For those Americans who competed in or watched the lawn tennis match between the American Bar Association and the Bar Lawn Tennis Society for the William C. Breed Memorial Cup, Saturday afforded a chance to see the sacred Wimbledon Centre Court turf. Other sporting relaxation took the form of golf matches at Woking and Ascot.

In June, 1215, King John assented —albeit unwillingly—to Magna Charta and 742 years later a memorial was dedicated to this great document of which four copies—all in England —are still in existence. Train, bus and car loads of members of the Association and of the English legal profession travelled down to Thames-side Runnymede on Sunday afternoon, July 28, to witness this great ceremony of dedication. An impressive memorial had been designed by Sir Edward Maufe, R.A., and erected on the gentle slopes of the upper bank of the River Thames where Magna Charta was granted. Speeches by E. Smythe Gambrell; the Right Honorable Lord Evershed, Master of the Rolls; Charles S. Rhyne; and the Rt. Hon. Sir Hartley Shawcross, Chairman of the General Council of the Bar, preceded the unveiling ceremony. It was an impressive and moving ceremony, but as Lord Evershed remarked, in weather unlike that which prevailed at the ceremony in 1215, for it was neither sunny, soft nor still at Runnymede on Sunday, and only just did the rain hold off and a watery sun peep through ominous black clouds as the 751st Air Force Band of the Third United States Air Force played the two National Anthems following the unveiling of the Memorial.

On Monday morning there were further sessions of the Sections of Criminal Law and Legal Education in the London County Council Conference Hall and the Senate House of the University of London.

Jonathan Stone expects to enter Oxford this autumn to study politics, philosophy and economics. He has completed the first part of his bar examination and is the Assistant Editor of the bar student's magazine Glim.

The true highlight of the whole Annual Meeting in London was undoubtedly on the Monday afternoon when Her Majesty the Queen gave a magnificent reception in the gardens of Buckingham Palace which Her Majesty herself, His Royal Highness Prince Philip, the Duke of Edinburgh, Her Majesty Queen Elizabeth, the Queen Mother, and Her Royal Highness the Duchess of Kent graciously attended. In addition to the presentation of the leaders of the Meeting, many other members of the American Bar Association were presented to Her Majesty as she made her way across the vast velvety lawn towards her private tea enclosure. For most, it was an incredible spectacle, on a fine, but not too hot afternoon: the majority of Her Majesty's English guests and indeed some of the members of the American Bar Association were in the traditional Palace garden party attire of morning coat and top hat. It was not difficult to see how thrilled everyone was by the whole proceeding, and a reporter of a leading London daily newspaper described it as

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Insurance Problems:

The Effect of the Atomic Age

by **Francisco Ortigas, Jr.** · ***of the Bar of the Republic of the Philippines (Manila)***

To some, it may seem a long time since the first atomic bomb dropped out of the bomb chute of the Enola Gay over Hiroshima that August day in 1945, but the world is still only at the beginning of the atomic age. Mr. Ortigas points out that increased use of nuclear power, whether for peace or war, raises tremendous problems for society, the answers to which are taxing many of the best human brains. In this article, he treats specifically of the meaning of the atomic age for the lawyer and the insurance company. The article is taken from an address delivered before the Philippine Insurer's Club, in Manila.

We, who are living today, are fortunate because the scientific limitations of a decade ago, coupled with human hesitancy during these current years, have delayed and prevented the use of the atomic formulae for war purposes and have thus given a reprieve to our generation.

Atomic weapons are now spoken of in many quarters as weapons of peace and not as weapons of war. The thought is that, with the development of nuclear weapons, nations are more prone to keep the peace than to break it. I sincerely hope that this way of thinking will prevail for all times, like a sword of Damocles, whipping nations into line and actual cowing them into preserving the peace.

I am afraid that the world's destruction from nuclear energy could be theoretically possible at the hands of one man. I think it was the Greek Archimedes who once exclaimed that, were he to be given a place whereon to stand, he could move the world! It was no idle boast, for he was referring to the almost unlimited multiplication of power through the use of levers. His statement, however, was limited to theoretical but impractical feasibility. On the other hand, the destruction of atoms by the explosion of other atoms, through a chain reaction, is, in my opinion, a practical possibility. Thus, a single man may explode some atoms somewhere in the world through a process yet to be discovered, and the explosion of those atoms, through chain reaction, may explode all the other atoms in and around us and succeed in converting our planet into a flaming sun. Who can guarantee that, in the centuries to come, no sane or insane scientist, feeling sorry for his own life and for the world in general, or fanatically believing he was fulfilling a mission, may not start an atomic chain reaction which will engulf mankind in total annihilation? Who can insure that no scientist with the atomic know-how will ever run amuck?

In 1945, we became conscious of the devastating power of nuclear energy and, in general terms, people were wont to say that an atomic war with both sides being able to use nuclear weapons would spell total destruction for our world. In recent months and years, we have come to better realize that war between two nations would not be merely destructive of the belligerents but of other countries as well. Lt. Gen. James M. Gavin of the United States Army has recently given the considered opinion to the Congress of the United States that if American air forces were to atom-bomb Russian territory, the radioactive fallout might reach the Philippines and cause the death of millions of our people. The wide area which might be affected by the explosion of atom bombs is being deeply impressed in our consciousness by the several tests which the United States has been undertaking in the Eniwetok area of the Pacific. The consciousness that an atom explosion creates a broad area of responsibility has already been so deeply implanted in our minds that the common people now impute radical changes in our weather to atmospheric disturbances produced by American and Russian tests of nuclear weapons.

The implications of the atomic age are too plain and too forceful to negate their being overlooked. They have to be faced squarely with the highest type of moral courage. It is gratifying to know that brilliant minds have worked, and are still working, on ways and means to adjust the pre-atom world to the new era with the least damage and the utmost advantage to the human race. Homer D. Crotty of the California Bar, for instance, wrote an article in the AMERICAN BAR ASSOCIATION JOURNAL of December, 1951, wherein he assumed that the catastrophe of an atomic bomb dropping on a metropolitan area might destroy the courthouses, the court records and, possibly, the judges. In such a case, the problem arises and the question is asked, how shall the administration of justice be implemented? In Mr. Crotty's article, he urges the legal profession to engage now in long-range planning to safeguard their records for the protection of their clients so that the legal profession may avoid a state of catalepsy in the event of an atomic air raid.

Hydrogen-Bomb Testing . . . *Danger of Pollution?*

In the April, 1955, issue of the *Yale Law Journal*, Mr. Emanuel Margolis, a member of the American Society of International Law, discussed the testing of hydrogen bombs from the point of view of international law with specialized mention of the law of fisheries and of the law of pollution. In the same issue of the periodical, Myres S. McDougal, Professor of Law at Yale University, and Norbert A. Schlei of the *Yale Law Journal*, discussed security measures for hydrogen-bomb tests. Ambrose B. Kelly, General Counsel of the Associated Factory Mutual Fire Insurance Companies, has written a paper on "Fire Insurance Problems in the Atomic Age" which was published in the 1955 proceedings of the Section of Insurance Law of the American Bar Association. Even *Richards on Insurance*, which is a classic insurance text, in its fifth edition published in 1952, has included a section on "damage or loss due to atomic weapons".

The crying need for atomic insurance is worldwide. As stated by Col. William Schiff, President of Schiff, Terhune & Company, Ltd., Wall Street insurance brokers, "never before have we had a dangerous industrial or war material against which some measure of protection for the prudent individual or business organization was not afforded by the insurance industry". In the United States, responsible parties are studying the feasibility of establishing a "catastrophe pool" to meet losses from atomic devastation. To help insurance companies meet policyholders' losses from atomic causes, the United States Congress is considering the approval of a bill on atom insurance the details of which are however still unavailable. This was reported in the May 26, 1956, issue of *Business Week*.

Most of you must know the importance of the catastrophic accident hazard in the business of insurance. A catastrophe may be caused by nature, like the volcanic eruption of Mt. Pelée in Martinique, West Indies, on May 8, 1902, which was responsible for the death of about 40,000 people. A catastrophe may also be caused by man, like the German program of extermination of the Jews which, from 1939 to 1945, resulted in the loss of life of about six million Semitics. The significance of those figures for insurance purposes is very weighty indeed. To the various causes of catastrophes heretofore known must now be added that emanating from nuclear energy. The accidental explosion of an atomic electric plant can produce a peacetime catastrophe which may drain the resources of an insurance company doing business in the locality. Some companies, the John Hancock Mutual Life Insurance Company among them, have made reinsurance arrangements for excess losses due to catastrophe which produce concentrated claims. This is another instance where the pre-atom world is being adjusted to the new conditions of our atomic era.

Another example of a positive step being taken by the insurance industry to meet the changed conditions of the atomic age has been reported in the July, 1956, issue of the *Spectator* as follows:

> May 25—*Industrial users of nuclear energy* can now start applying for insurance—from three different offices. First announcement came from the Nuclear Energy Liability Insurance Association, 60 John Street, New York 38, where a syndicate of more than 110 stock casualty companies have indicated they expect to be able to provide $50 million coverage on radiation liability hazards for each industry-operated reactor.
>
> Second was the Mutual Atomic Energy Pool, to be managed by American Mutual Reinsurance Co., 919 North Michigan Ave., Chicago, in which 103 mutual fire and casualty companies will provide $11,114,000 in "net American domestic capacity" on each reactor for direct physical damage and damage to persons or property from radiation or radioactive contamination.
>
> Third announcement came from the Nuclear Energy Property Insurance Association, 85 John Street, New York, through which 150 stock fire and property companies have made tentative commitments which indicate a capacity of at least $50 million against property hazards for each reactor.

The effect of atomic bombings on investments, which is a field very critical to life companies, has also been generally surveyed. Curtis Ter Kuile, an investment banker, wrote an article in the *Commercial and Financial Chronicle* of February 15, 1951, wherein he contended that, despite the destructive potentialities of atomic explosions, they will not seriously affect investment values. I hope he is right, but I am sure that there are plenty of people who hold views directly opposite to his. Most of the articles I have read on the implications of the atomic era are based on its revolutionary aspect; that is to say, on radical and immediate changes which the atomic age will or should produce. Very few

deal with the evolutionary effects which the use of nuclear energy will produce in our world. One of the few men I know who has thought of evolution, instead of revolution, in this period of infancy of the atomic age is Dr. N. B. Roy, radio-therapy professor at the medical college of the University of Calcutta, who was in Manila a few weeks ago. According to Dr. Roy, tests of nuclear weapons might eventually convert us into a race of idiots and monsters.

I am informed that at the University of Michigan, there is a "Michigan Memorial-Phoenix Project", one of whose aims is to undertake long-term programs of research into the social or evolutionary implications of the atomic era. Once the studies in that particular field are released, these will undoubtedly prove of vast instructive and informative value to students of sociology.

Sociological studies involving predictions for the future are inherently difficult and, oftentimes, will subject the student to ridicule or condemnation. To make my point clear, let me refer to this particular example: When the first gang of Negro slaves was brought to the United States, the Americans did not foresee the eventuality that the Negroes would later on raise the question of desegregation. Although desegregation has already been pronounced by the Federal Supreme Court to be part of the law of the land, it is still dividing the American people into two groups of directly opposing philosophies. At that time, it would have been extremely difficult to have foreseen the possibility, now being foreseen, that a Creole nation might be evolved in the United States as a consequence of the importation of slave labor about 200 years ago. To have made such a prediction during the eighteenth century would have subjected the enterprising sociologist to ridicule, or even social ostracism as an enemy of economic progress.

There are to me no known sociologists at present who would dare to envisage what the atomic age might do to our society, with or without an atomic global war. Any work in that respect would simply be colossal. It would require the highest of human intelligence, and the result of the studies would probably be denounced as wanton predictions or idle conjectures. Even now, there may be people who would think very unfavorably and uncomplimentarily of Dr. Roy's fears of the evolution of a race of idiots and monsters from continued nuclear tests.

My purpose in speaking to you on this occasion about the advent of the atomic era is to give you food for thought, to lay before you the basis of private and individual analysis on your part, rather than to sponsor any particular theory of mine. The phrase I would like you to focus on and think about is whether or not the atomic age will influence the present life span of man; or, more related to your specific field of interest, what effect the age of the atom will have on the mortality tables. Will this atomic era contract or expand the tables?

As all of you must know, mortality tables constitute the most important factor in the determination of life insurance premiums. As the expected life span becomes shorter, the rate increases. As the life span becomes longer, the premiums are decreased. You may have noticed that life companies, especially those in the United States, advertise facts and propagandize regimens which tend to prolong life. As a matter of fact, there are many life companies which actually undertake and sponsor projects for the prolongation of the lives of their policyholders. To the layman, the efforts of life insurance companies to extend the life span of many may appear to be purely civic gestures designed to enhance the public relations of the companies. That layman's view is based on the proposition, more or less generally true, that since premiums for life insurance are based on life expectancies as reflected in the mortality tables, it is immaterial to insurance companies that the life span of man be short or long. All the insurance companies have to do is to increase or decrease the premiums proportionately as the life span decreases or increases.

One better versed in life insurance, however, will not fail to see that the objective of life companies in wishing to extend the human life span is not merely a civic project alone but a business and economic plan as well. In the first place, if the life span of man is lengthened, there will be a period of great advantage to the companies before the mortality tables are actually re-adjusted to conform to the lengthened span. Within that period, fewer policyholders will die as predicted by the mortality tables, and this obviously will be of decided advantage to the insurance companies. In the second place, if the life span of man should be extended, the rate of premiums will necessarily be reduced. This

Francisco Ortigas, Jr., has been in private practice of the law in the Philippines since 1931. A graduate of De La Salle College, he received the degree of LL.B. from the University of the Philippines in 1931 and his LL.M. from Sto. Tomas University. He was a member of the Philippine Reparations Mission to Japan and of the Plenipotentiary Panel to negotiate the reparations agreement with Japan. He has been a member of the American Bar Association since 1936.

will mean that more people can purchase life insurance because of the cheaper rates, and it will consequently augment the business of the companies.

With the same facility that benefits which will redound to the life companies from the prolongation of the human life span have been expounded, it should be easy to demonstrate the disadvantages which will accrue to the companies should the life span of man be reduced or shortened. All that would be necessary to do is to reverse the propositions. Firstly, if the life span of man were to be shortened, the life companies will suffer prejudice during the interim that the mortality tables have not been actually altered. During this period, howsoever short, more policyholders will die than as predicted by the old tables, and this will be detrimental to the companies. Secondly, the shortening of the life span of man will necessarily bring about higher premiums. Since the cost of life insurance will thus be increased, fewer people can be expected to purchase life policies, and this will be inimical to the life insurance business.

Thus, you can see how the problem of whether the atomic age will lengthen or shorten the life span of man is of immense concern to the life companies. It may put the life insurance business on stabler grounds if reasonable forecasts could be made before the realities actually happen.

While we cannot be positive to the contrary, I believe no one can definitely assert at this time that the atomic age will not affect our present mortality tables. The determination of the average human lifetime is dependent not only on deaths due to natural causes but also on deaths caused by diseases. Among the diseases which account for a substantial percentage of yearly mortality is cancer. If death from this disease is reduced during the atomic age, the average life span of man will be lengthened. And there are current indications to that effect.

The Brighter Side . . .
A Cure for Cancer?

Among the by-products of the release of nuclear energy are radioactive isotopes which are used in the treatment of cancer. If, in the long run, these cures prove substantially effective, then death from cancer will be reduced and the average life span of man may be lengthened to the advantage of the life insurance business. That is one side, the brighter side, of the problem of whether or not the atomic era will influence the mortality tables to the advantage of the life companies.

The beneficent effects of the use of radioactive isotopes, on the other hand, might be neutralized by harmful radiation. When an atom is split, the operation causes the release of certain rays which are directly dangerous to human life. The alpha, beta and gamma rays of nuclear fission will damage the human structure increasingly in the order they have been named. The actual damage which radiation does to the living cell is not precisely known, but some reliable authorities conjecture that the proteins of the cell undergo ionization.

I have read, quite recently, an article entitled "Effects of Radiation" written by Dr. John C. Bugher, Director, Division of Biology and Medicine, U.S. Atomic Energy Commission, and which has been published in the book *Lectures on Atomic Energy, Industrial and Legal Problems*, a publication of the University of Michigan Law School. Dr. Bugher has reported that atomic radiation can cause cancer of the skin, cancer of the lungs, and leukemia, or cancer of the blood. Said Dr. Bugher:

> We are concerned here with the incitation to cancerous change in the tissues of such individuals who have received large amounts of radiation over a long period of time. The causation of skin cancers, for example, is well recognized as one of the hazards that the older roentgenologists suffered through lack of knowledge of the long-range consequences of excessive radiation dosage. The occurrence of leukemia, a blood-cell cancer, is more and more recognized as one of the consequences of excessive exposure. We have other cancers, such as those of the lung, which presumably may be related in some instances to the inhalation of radioactive material, so that when we get into problems of uranium mining, particularly in rich deposits, the industrial problem of the health and safety of the miners in terms of inhalation becomes a real concern.

Thus, we have a situation where the atomic era, like a vicious circle, is seen both to alleviate and to worsen the incidence of cancer among men. This may result in neutralization which, in turn, will free the current mortality tables from change during the atomic age.

There may be a more direct effect of atomic radiation on the life span of man. According to Dr. Bugher, mice subjected to radiation grow old at a faster pace. In other words, their life span is shortened. Said Dr. Bugher:

> For long exposures to fairly large amounts of radiation the effects may be more profound. Somewhat vague as yet, but apparently true in experimental animals, is an effect which is as though the pace of life had been accelerated and old age came early. In mice given relatively minor doses of radiation, the animal appears to grow old at an earlier time. There is no conclusion that one can reach from an individual mouse, but looking at a population of mice so exposed, they appear to age somewhat faster than normal mice would do.

Dr. Bugher's experiments or observations are rather significant because in the same article I have cited, he also made the statement that "Generally speaking, it seems to be true that the various forms of radiation have similar effects on all living things, whether they are man, animal, or plant". Therefore, if radiation can accelerate old age in a mouse, it can also accelerate and shorten the life span of man.

We may find some consolation in the fact that Dr. Bugher's intimation of the possible shortening of the life span of living creatures is based on appreciable amounts of radiation absorbed by them. In the case of human beings, on that basis,

we probably should not be concerned at all with the shortening of our lives because of appreciable radiation. If we should be subjected even to "relatively minor doses of radiation", we would probably die from cancer or from the direct toxic effects of the radiation without waiting for the shortening of our life span. The bigger danger would lie in the possibility that with the establishment of atomic plants and with the continuation of nuclear tests, the atmosphere may be so charged with more than the normal amount of alpha, beta and gamma rays as to produce results which will not be immediately apparent. I feel that if the life span of man should be reduced by five to ten years, the resulting change will not be apparent except through the incidence of death as tabulated in a statistical chart.

Let me state my point in another way. If "relatively minor doses of radiation" can produce visible signs of the shortening of the life span, that life span might unnoticeably be shortened with very, very small amounts of radiation. If the atomic age should result, as it very plausibly could result, in the increase of radiation which is normally present in the atmosphere, this increase of radiation, while not producing any immediately visible ill effects on human beings, might shorten the human life span by five to ten years. This might not be a serious blow to mankind, but the corresponding contraction in the mortality tables will greatly affect the business of life insurance companies.

In resumé, we have a situation where the advantage which may be gained from relief from cancer through the use of radioactive isotopes might be neutralized by augmented incidence of cancer due to radiation exposure. On top of that is the possibility that increased radiation all about us, without showing any visible injury, might accelerate our old age. On these theorizations, we can pursue our own contemplations as to whether or not the atomic age will radically influence the mortality tables currently used by the life companies.

Notice by the Board of Elections

The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1958 Annual Meeting and ending at the adjournment of the 1961 Annual Meeting.

Arkansas	Minnesota
Colorado	Nevada
Delaware	New Hampshire
Georgia	New York
Idaho	Ohio
Indiana	Oregon
Louisiana	Rhode Island
Maryland	Utah
	West Virginia

Nominating petitions for all State Delegates to be elected in 1958 must be filed with the Board of Elections not later than March 28, 1958. Petitions received too late for publication in the March issue of the JOURNAL (deadline for receipt January 31) cannot be published prior to distribution of ballots, which will take place on or about April 4, 1958.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1155 East 60th Street, Chicago 37, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M., March 28, 1958.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and address of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS
Walter V. Schaefer, Chairman
Harold L. Reeve
Robert B. Troutman

Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

Admiralty . . .
limitation proceedings

British Transport Commission v. *United States*, 354 U. S. 129, 1 L. ed. 2d 1234, 77 S. Ct. 1103, 25 U. S. Law Week 4426. (No 247, decided June 10, 1957.) *On writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Affirmed.*

This decision held that parties might file cross-claims against each other in an admiralty limitation proceeding for damages arising out of the same maritime collision.

The collision occurred in the North Sea in 1953 when the *U.S.N.S. Haiti Victory*, owned by the respondent, rammed the *Duke of York*, owned by the petitioner. The *Haiti* suffered minor damage, but the *Duke's* loss was nearly $1,500,000. In addition, 437 persons aboard the *Duke* were killed, many were injured and many lost their baggage. The *Haiti* returned to the United States and thereafter this proceeding was filed by the United States under the Limited Liability Act, R.S. §§4283-4286, as amended, for exoneration from or limitation of liability, claiming that the fault was entirely that of the *Duke*. Petitioners filed a claim for $1,500,000, claiming that the fault was the *Haiti's*. Various claimants against the *Haiti* filed impleading petitions against the *Duke*. The District Court dismissed all these cross-claims, on the theory that the Act offered a forum for the adjudication of claims against the petitioner (the United States) only. The Court then held hearings and exonerated the *Haiti* from all blame, holding the *Duke* solely responsible for the collision. The Court of Appeals affirmed this holding but reversed as to the dismissal of the cross-claims.

The Supreme Court affirmed the judgment of the Court of Appeals in an opinion written by Mr. Justice CLARK. The Commission contended that Rule 56 of the General Admiralty Rules, under which the Court of Appeals had permitted the cross-claims, applied to libel, not limitation actions. To this, the Court replied that the Admiralty Rules were not promulgated as technicalities restricting the parties and the court to the relevant issues before it. "The question is not what 'tag' we put on the proceeding, or whether it is a 'suit' under Rule 56 or a libel *in personam*, or whether the pleading is of an offensive or defensive nature, but rather whether the Court has jurisdiction of the subject matter and of the parties" the Court declared. The Court likened this proceeding to one in equity, which looks to a "complete and just disposition of a many cornered controversy". The Court said that, since the fault of the disaster had been adjudicated against the Commission, it was only reasonable that the interests of all claimants should be determined, rather than requiring them to file separate secondary actions.

Mr. Justice BRENNAN, joined by Mr. Justice FRANKFURTER and Mr. Justice HARLAN, wrote a dissenting opinion which argued that Rule 56 authorizes cross-claims only in libel proceedings and if the practice is desirable in limitation proceedings it should be introduced by amendment of the Admiralty Rules. The dissent felt that it was inequitable to apply to the British Commission a practice first announced in the Court's opinion, pointing out that English rules of liability are more favorable to a carrier than ours.

The case was argued by Dean Acheson for petitioner, by Wilbur E. Dow for respondents and W. G. Healam for the United States.

Admiralty . . .
limitation proceedings

Lake Tankers Corporation v. *Henn*, 354 U. S. 147, 1 L. ed. 2d 1246, 77 S. Ct. 1269, 25 U. S. Law Week 4431. (No. 445, decided June 10, 1957.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Affirmed.*

This was another admiralty limitation proceeding which raised the question whether a claimant in a maritime disaster could bring suit in a state court when the value of the vessel exceeded the total of all claims. The Court held that a suit in the state courts was possible under the circumstances.

Respondent's husband lost his life in a collision on the Hudson River with one of the petitioner's tugs which was push-towing one of its barges. She brought suit in a New York court for $500,000 damages, claiming that the loss was caused by the negligent operation of the tug and barge. Actions by four other claimants were also begun in the New York courts. The petitioner then filed this proceeding in admiralty for exoneration from or limitation of liability. All the claimants filed their claims in the federal proceeding and all of them relinquished any rights to damages in excess of their respective claims. The aggregate amount of all the claims for which the petitioner could be held liable if found at fault was less than the value of the vessels and their freight. The District Court then vacated its order restraining suit in the state courts and the Court of Appeals affirmed, modifying the order so as to place even stricter restric-

Reviews in this issue by Rowland Young.

tions on the state court proceedings.

Mr. Justice CLARK delivered the opinion of the Supreme Court affirming. The Court pointed out that the purpose of the Limited Liability Act was to encourage the development of American merchant shipping by making it possible to limit a shipowner's liability to the value of the ship and cargo. Here there was no necessity for the maintenance of the *concursus* since the fund paid into the proceeding by the owner exceeded the claims against it. The Court reasoned that to expand the jurisdictional provisions of the Act to prevent the respondent from proceeding with her case in the state court would "transform the Act from a protective instrument to an offensive weapon by which the shipowner could deprive suitors of their common-law rights. . . ."

Mr. Justice HARLAN, joined by Mr. Justice FRANKFURTER and Mr. Justice BURTON, wrote a dissenting opinion which took the position that, since the amount of the claims exceeded the value of the vessels and their cargo when the federal jurisdiction was invoked, steps taken afterwards by the claimants should not be allowed to impair the limitation proceeding any more than would "a subsequent reduction in the amount involved be permitted to defeat a diversity jurisdiction which had initially been properly invoked".

The case was argued by Eugene Underwood for the petitioner and by Frank C. Mason for respondent.

Attorneys . . . *disbarment*

Theard v. *United States*, 354 U. S. 278, 1 L. ed. 2d 1342, 77 S. Ct. 1274, 25 U. S. Law Week 4502. (No. 68, decided June 17, 1957.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Reversed and remanded.*

In this case, the petitioner, a member of the Louisiana Bar, had been disbarred by the United States District Court for the Eastern District of Louisiana after the Louisiana Supreme Court had ordered his name stricken from the roll of Louisiana attorneys. The Court of Appeals affirmed. The reason for the action by the Louisiana court was that the petitioner, in 1935, more than fifteen years before, had allegedly uttered a forgery. At the time, both criminal and disbarment proceedings were halted because it was found that the petitioner was "suffering under an exceedingly abnormal mental condition, some degree of insanity", and he was committed to an asylum. The Louisiana court disbarred him more than eighteen years later.

Mr. Justice FRANKFURTER delivered the opinion of the Supreme Court reversing the federal district court's disbarment order. The Court said that the action of the Louisiana court was not binding upon the federal courts and that disbarment by the federal courts does not automatically follow a state disbarment order. "We do not think" the Court said, "that 'the principles of right and justice' require a federal court to enforce disbarment of a man eighteen years after he had uttered a forgery when concededly he 'was suffering under an exceedingly abnormal condition, some degree of insanity' ".

The CHIEF JUSTICE and Mr. Justice BLACK concurred in the result.

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

The case was argued by Delvaille H. Theard for petitioner and by Edward H. Hickey for respondent.

Commerce . . . *local taxation*

West Point Wholesale Grocery v. *City of Opelika*, 354 U. S. 390, 1 L. ed. 2d 1420, 77 S. Ct. 1096, 25 U. S. Law Week 4502. (No. 478, decided June 17, 1957.) *On appeal from the Court of Appeals of Alabama. Reversed.*

This decision held that a municipal "privilege tax" levied on out-of-state wholesale grocers was unconstitutional.

An Opelika, Alabama, ordinance levied an annual "privilege tax" on wholesale grocers that delivered within the city from points outside. The appellant, a Georgia corporation which solicited business in Opelika but had no place of business, office or inventory in the town, sued for recovery of the taxes.

The opinion of the Court was written by Mr. Justice HARLAN, who held that this was plainly a discriminatory flat-sum privilege tax on an interstate enterprise, and as such was forbidden by the Commerce Clause. No comparable flat-sum tax was levied upon the local merchants, the Court pointed out.

Mr. Justice BLACK dissented without opinion.

The case was argued by M. R. Schlesinger for the appellant and by R. E. L. Cope for the appellee.

Commerce . . . *temporary licenses*

Pan-Atlantic Steamship Corporation v. *Atlantic Coast Line Railroad, Interstate Commerce Commission* v. *Atlantic Coast Line Railroad*, 353 U. S. 436, 1 L. ed. 2d 963, 77 S. Ct. 999, 25 U. S. Law Week 4383. (Nos. 408 and 424, decided June 3, 1957.) *On appeals from the United States District Court for the District of Massachusetts. Reversed.*

The issue here was the power of the Interstate Commerce Commission to extend a shipping company's temporary authority for more than 180 days. Section 311 (a) of the Interstate Commerce Act allows the Commission to grant "temporary authority" to a common carrier by water to institute service for which "there is an immediate and urgent need". The act provides that the temporary authority "shall be valid for such time as the Commission shall specify, but not for more than an aggregate of one hundred and eighty days". Section 9 (b) of the Administrative Procedure Act provides that "In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency".

Pan-Atlantic applied for a permanent certificate of convenience and necessity in May, 1955. The Commission granted a temporary authority for 180 days. It had not concluded its proceedings at the end of 180 days and authorized Pan-Atlantic to continue operations until further order. The appellees, seven railroads, opposed the extension and instituted suit in the District Court to vacate the Commission's order. The District Court held for appellees, apparently feeling bound by *stare decisis*.

Speaking for the Supreme Court, Mr. Justice DOUGLAS reversed, rejecting an argument that the word "license" in the Administrative Procedure Act included only licenses that are permanent. We see no reason, the Court declared, "why the provisions of this . . . Act may not be invoked to protect a person with a license from the damage he would suffer by being compelled to discontinue a business of a continuing nature, only to start it anew after the administrative hearing is concluded". The Court added that, while initially the Commission can do no more than issue a temporary authority, once the conditions set forth in the Administrative Procedure Act have been satisfied, the Commission can extend the authority "in the interests of economy and efficiency."

Mr. Justice BURTON, joined by Mr. Justice HARLAN and Mr. Justice WHITTAKER, wrote a dissenting opinion which argued that the 180-day-time limit was an unconditional maximum, inserted into the Interstate Commerce Act to prevent overcompetition in the transportation industry. As the dissent saw it, Congress intended to give the Commission discretionary power to handle emergency situations and at the same time prod it to finish, within 180 days, its determination with respect to granting permanent authority.

The case was argued by David G. MacDonald for the appellant in No. 408, by James A. Murray for the appellant in No. 424, and by Charles H. Weston and William Q. Keenan for the appellees.

Labor law . . . *state labor policy*

International Brotherhood of Teamsters v. *Vogt, Inc.*, 354 U. S. 284, 1 L. ed. 2d 1347, 77 S. Ct. 1166, 25 U. S. Law Week 4504. (No. 79, decided June 17, 1957.) *On writ of certiorari to the Supreme Court of Wisconsin. Affirmed.*

In this decision, the Court upheld the power of a state court to enjoin picketing in order to carry out a legitimate state labor policy.

The respondent, owner and operator of a gravel pit, sought an injunction to restrain picketing of its plant by the petitioner unions who were attempting to induce some of the employees to join the unions. Because of the picketing, drivers of several trucking companies refused to deliver and haul goods to and from the plant, causing substantial damage to the respondent. The trial court granted the injunction. The Wisconsin Supreme Court at first reversed, but, on rehearing, affirmed on the ground that the picketing was for "an unlawful purpose" under Wisconsin law. The Court relied upon *Building Service Employees* v. *Gazzam*, 339 U. S. 532, and *Pappas* v. *Stacey*, 151 Me. 36, 116 A. 2d 497.

The opinion of the Supreme Court of the United States affirming was written by Mr. Justice FRANKFURTER. The Court's opinion reviews the entire line of cases from *Truax* v. *Corrigan*, 257 U. S. 312, through *Thornhill* v. *Alabama*, 310 U. S. 88, 99, which held that picketing was a form of constitutionally guaranteed free speech, and the cases following *Thornhill* which allowed some state restrictions upon picketing. The Court concluded from its review that a state, "enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy". The Court made it plain that it did not mean that the states could enact blanket prohibitions against picketing. Wisconsin's statute making it an unfair labor practice to coerce an employer into interfering with his employees' rights to join or refuse to join any union was a valid state policy upon which an anti-picketing injunction could be based, the Court said.

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

Mr. Justice DOUGLAS, joined by the CHIEF JUSTICE and Mr. Justice BLACK, wrote a dissenting opinion which argued that the Court had retreated from the *Thornhill* doctrine. The dissent argued that picketing could be regulated or prohibited only to the extent that it forms an essential part of a course of conduct which a state can regulate or prohibit.

The case was argued by David Previant for petitioners and by Leon B. Lamfrom for respondent.

Legislative investigations . . . *contempt*

Watkins v. *United States*, 354 U. S. 178, 1 L. ed. 2d 1273, 77 S. Ct. 1173, 25 U. S. Law Week 4510. (No. 261, decided June 17, 1957.) *On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Reversed and remanded.*

This decision reversed a conviction of contempt of Congress for failure to answer questions posed by the House of Representatives' Committee on Un-American Activities.

The petitioner, a labor union officer, was subpoenaed to appear before the Committee in 1954 and was asked questions about his past association with members of the Communist Party. He denied that he had ever been a member of the Communist Party, but frankly admitted that he had "freely cooperated" with the Communists to the extent that many of them may have believed that he was a Party member. He agreed also to answer any questions about himself and about persons still members of the Party. He refused, however, to answer questions about former members of the Party "who to my best knowledge and belief have long since removed themselves from the Communist movement". The latter questions, he contended, were

not relevant to the work of the Committee. At the direction of the House, a criminal prosecution was brought, petitioner waived jury trial, was found guilty and sentenced. On appeal, the Court of Appeals reversed by a three-judge panel, but upon rehearing *en banc* the Court affirmed.

The opinion of the Supreme Court reversing and remanding was delivered by the CHIEF JUSTICE. After tracing history of legislative investigations and the power of the legislature to punish for contempt from Parliament in medieval England to the landmark cases of *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881), *McGrain* v. *Daugherty*, 273 U. S. 135, and *Sinclair* v. *United States*, 279 U. S. 263, the Court noted that legislative investigations since World War II were a "new kind" which "involved a broad-scale intrusion into the lives and affairs of private citizens". The pre-war cases, said the Court, "defined the scope of investigative power in terms of inherent limitations of the sources of that power. In the more recent cases, the emphasis shifted to problems of accommodating the interest of the Government with the rights and privileges of individuals. The central theme was the application of the Bill of Rights as a restraint upon the assertion of governmental power in this form." In conducting investigations, the Court said, Congress must not unjustifiably encroach upon an individual's right to privacy or abridge his rights of free speech, press, religion or assembly. The Court quoted the resolution authorizing the creation of the Un-American Activities Committee, noting that it was extremely broad and in essence gave the Committee power to define its own authority, a power so broad that it was impossible to ascertain whether any legislative purpose was served by the disclosures sought by the Committee. The statute under which the petitioner was convicted imposed penalties for refusal to answer "any question pertinent to the question under inquiry". The vice in this, the Court concluded, was that, under the broad language of the resolution creating the Committee, the petitioner could not be sure what the "question under inquiry" was. The language of the Committee chairman at the hearings was equally vague, in the Court's view, and the petitioner was thus not accorded a fair opportunity to determine whether he was within his rights in refusing to answer.

Mr. Justice BURTON and MR. JUSTICE WHITTAKER took no part in the consideration or decision of the case.

Mr. Justice FRANKFURTER, who concurred in the holding and the opinion of the Court, wrote a concurring opinion which emphasized that questions put by a congressional committee "must be put with relevance and definiteness sufficient to enable the witness to know whether his refusal to answer may lead to conviction for criminal contempt and to enable . . . courts readily to determine whether the particular circumstances justify a finding of guilt".

Mr. Justice CLARK wrote a vigorous dissent. He argued that the powers of the Un-American Activities Committee were no broader than the powers of any other congressional committee and that the petitioner was fully informed of the subject matter of the inquiry and had a complete understanding of the hearings. The dissent took the position that the Committee was acting entirely within its scope and that the purpose of its inquiry was set out with "undisputable clarity". The petitioner was not asserting a right of freedom of speech, the dissent thought, but rather a right to remain silent—and no such general right is guaranteed by the Constitution.

The case was argued by Joseph L. Rauch, Jr., for petitioner and by Solicitor General Rankin for respondent.

Legislative investigations . . . *contempt*

Sweezy v. *New Hampshire*, 354 U. S. 234, 1 L. ed. 2d 1311, 77 S. Ct. 1203, 25 U. S. Law Week 4526. (No. 175, decided June 17, 1957.) *On appeal from the Supreme Court of New Hampshire. Reversed.*

Like the *Watkins* case, *supra*, this case dealt with the legislative power to punish for contempt during a legislative investigation, this time the legislative body being the New Hampshire legislature.

The investigation was conducted under a New Hampshire statute which, in effect, makes the state's attorney general a one-man legislative committee to investigate subversive activities. Sweezy appeared twice before the attorney general and, for the most part, was co-operative although he denied the constitutionality of many of the questions posed. He refused, however, to answer any questions about the Progressive Party or certain lectures he had given at the University of New Hampshire. Pursuant to the statute, the attorney general took this refusal to answer to a state court, which, after hearings, ruled that the questions were pertinent, propounded them to the witness, and, when he again refused to answer, ordered him committed to jail until purged of contempt. The state supreme court affirmed.

The judgment of the United States Supreme Court was announced by the CHIEF JUSTICE, who also wrote an opinion in which MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN concurred. Although the appellant had not met the jurisdictional requirements of 28 U.S.C. §1257 (2), the Court treated his appeal as a petition for writ of certiorari which it granted. This opinion discusses at some length the constitutional rights of witnesses before legislative inquiries, stressing the point that the New Hampshire Supreme Court had conceded that the witness's First and Fourteenth Amendment rights had been abridged—the state court viewing these rights outweighed in this case by the need of the legislative branch to be informed on a subject vital to the preservation of the government. The opinion however rested its reasons for reversal on the ground that there was nothing to indicate that the state legislature wanted the information that the attorney general

had sought, and, absent such a legislative desire, "the use of the contempt power, notwithstanding the interference with constitutional rights, was not in accordance with the due process requirements of the Fourteenth Amendment".

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

Mr. Justice FRANKFURTER, joined by Mr. Justice HARLAN, wrote a concurring opinion which took the position that it was immaterial to the federal courts how the New Hampshire legislature chose to exercise its investigative powers and that the case must be judged "as though the whole body of the legislature had demanded information of the petitioner". So viewed, this opinion held that the witness's First Amendment rights had been abridged and that the abridgment was not justified on this record by the state's right of self-preservation. "For a citizen to be made to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling" the opinion declared.

Mr. Justice CLARK, joined by Mr. Justice BURTON, wrote a dissenting opinion which argued that the Court had no right to strike down state action unless the interest in protecting the witness' rights was greater than the state's interest in uncovering subversive activities, and the Court had made no such findings in this case.

The case was argued by Thomas I. Emerson for the appellant and by Louis C. Wyman for the appellee.

Railroads . . .
state-owned carriers

California v. *Taylor*, 353 U. S. 553, 1 L. ed. 2d 1034, 77 S. Ct. 1037, 25 U. S. Law Week 4378. (No. 385, decided June 3, 1957.) *On writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Affirmed.*

This decision held that a state-owned railroad's relations with its employees are subject to the federal Railway Labor Act in spite of the fact that the civil service laws of the state express a contrary policy.

The Belt Railroad, owned by the State of California, is concededly engaged in interstate commerce. In 1942, the Board of State Harbor Commissioners, which operates the railroad, entered into a collective bargaining agreement with two railroad brotherhoods as to promotions, layoffs and dismissals as well as to rates of pay and overtime. This agreement was observed by both parties until 1948, when a successor Harbor Board instigated litigation in the state courts on the theory that the Railway Labor Act was not applicable to the Belt Railroad and that the wages and working conditions of Belt employees were governed by the California civil service laws. The trial court and the state district court of appeal both rejected this contention, but the state supreme court accepted it. The present action was filed in a federal district court in Illinois by five Belt employees against five members of the National Railroad Adjustment Board who had refused to consider claims against Belt on the ground that the Board had no jurisdiction in view of the California court's holding. The five employees sought a court order requiring action on their claims. The federal District Court granted California's motion for summary judgment and dismissed the complaint. The Court of Appeals reversed.

The Supreme Court affirmed, speaking through Mr. Justice BURTON. The Court pointed out that the Railway Labor Act, by its terms, applies to "*any* carrier by railroad subject to the Interstate Commerce Act", and this included Belt because it was concededly a common carrier engaged in interstate commerce. The Court was not impressed by California's argument that Congress had not intended to include state-owned railroads in the Railway Labor Act since other federal statutes governing employer-employee relationships had expressly exempted employees of the United States or of any of the states. The argument cuts the other way, the Court said, since it shows that when Congress wishes to exclude state employees it does so expressly. The Court could find no constitutional problem either. California has subjected itself to the federal statute by engaging in interstate commerce by rail, the Court declared.

The CHIEF JUSTICE took no part in the consideration or decision of the case.

The case was argued by Herbert E. Wenig for petitioner and by Burke Williamson for respondents.

What's New in the Law

The current product of courts, departments and agencies

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Antitrust Law . . .

acquisition of stock

An argument that a possible merger of the eighth and eleventh ranking sugar refiners would not violate the antitrust laws because it would produce a unit better able to compete with the pre-eminent companies in the field has failed to strike a sympathetic chord in the United States District Court for the Southern District of New York.

In a suit brought by a beet sugar producer against a holding company that wholly owns a cane sugar refiner, the Court has issued an injunction enjoining the defendant from voting its stock in the plaintiff, from acquiring more stock and from gaining representation on the plaintiff's board of directors. A prayer for divestiture of the stock was not granted by the Court.

The Court found that the defendant, its board chairman and persons allied with him had succeeded in purchasing about 23 per cent of the voting stock of the plaintiff corporation. The defendant's board chairman conceded that the purchases were made in order that a merger or common control might be effected.

On this basis the Court found a violation of §7 of the Clayton Act, which with the amendments of 1950 prohibits a corporation from acquiring directly or indirectly "the whole or any part of the stock" of another corporation "where in any line of commerce in any section of the country" the effect of such acquisition may be substantially to lessen competition or to create a monopoly. This statute now permits a court to forestall stock acquisitions before events proceed to a point where there is a violation of the Sherman Act, the Court said. The Court concluded that either a merger or common management of the two companies would tend to lessen competition in at least a ten-state midwestern area where the companies are now prime competitors.

As to the argument that a merger would produce a stronger competitive unit, the Court declared: "To the extent that a union of Crystal and Colonial would produce a stronger entity, it is true that the new firm would be a greater rival of other suger refiners. It does not follow, however, that competition in the industry would thereby be increased. . . . A union of two units of economic significance fails to give rise to a presumption that competition is thereby promoted. . . . Certainly to the extent that a reduction in the number of significant firms in an industry reduces the incentive to reap a short term advantage by independent action, economic analysis indicates that an increased concentration is detrimental to competition."

(American Crystal Sugar Company v. *Cuban-American Sugar Company*, United States District Court, Southern District of New York, June 6, 1957, Dawson, J.)

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

Attorneys . . .

unauthorized practice

A California court has affirmed a $7,131 judgment against a notary public who prepared a void will because he thought wills needed only notarization and not witnesses. The judgment was in favor of the person who would have been the sole legatee and devisee under the will, but who received only one eighth of the estate because of intestate distribution.

The notary public relied on California case law that a lawyer is not liable to a would-be beneficiary for the preparation of a void or ineffective will. But the First District Court of Appeal distinguished the cases. It pointed out that the notary public was practicing law when he prepared the will and that thus he was violating the state's business and professions code, which provides: "No person shall practice law in this State unless he is an active member of the State Bar." The Court declared that the violation of a statute, which directly causes the injury of another constitutes negligence as a matter of law. Thus, the Court concluded, the negligence basis of the suit, not present where a licensed attorney is sued, was unauthorized practice of the law.

The Court conceded that there was some anomaly in an injured beneficiary being unable to recover from a negligent licensed attorney but able to recover from a negligent unlicensed person. It criticized the basis of the case denying recovery against an attorney, which was that the injury was against the testator whose wishes for the disposition of his estate were thwarted, rather than against the disappointed beneficiary.

(Biakanja v. *Irving*, California District Court of Appeal, First District, March 14, 1957, Stone, J., 310 P. 2d 63.)

Courts . . .

contempt

The Court of Appeals for the Sixth Circuit has affirmed the one-year contempt sentence imposed on the man who played a big role in stirring up the Clinton, Tennessee, school integration riots in August of 1956.

The Clinton authorities were preparing to open an integrated school

system when the respondent—John Kasper—arrived in town. He immediately organized mass meetings and inflamed the populace to such an extent that the National Guard was called to preserve order. During this time a restraining order against his activities was obtained on the ground that he was interfering with school integration, which was being implemented in accordance with another injunction. In defiance of the order, Kasper continued his activities, and he was brought in on an attachment for criminal contempt.

The Court rejected Kasper's argument that his conduct was free speech protected by the First Amendment. "The right to speak is not absolute", the Court declared. "The First Amendment does not confer the right to persuade others to violate the law." The Court found that the clear-and-present-danger test was satisfied without a doubt. "Danger that calls for the presence of the state patrol and the National Guard, with the use of bayonets and tear gas, is, we think, within the narrowest limits of the concept and cries aloud for such court action as was here taken."

The Court also turned down several jurisdictional and procedural contentions raised by Kasper.

(Kasper v. *Brittain,* United States Court of Appeals, Sixth Circuit, June 1, 1957, Simons, C. J.)

Courts . . .

full faith and credit

New York must give full faith and credit to a foreign judgment even though the judgment is obtained in an action which was unenforceable in New York, the Court of Appeals of New York has held, with two judges dissenting.

The judgment was obtained in Vermont by a resident of that state against a resident of New York in an action for alienation of affections and criminal conversation, both of which actions are abolished by statute in New York. When the plaintiff could not collect on her judgment in Vermont, she commenced an action to enforce it in New York.

The Court declared that foreign judgments were not included within the prohibitions of the statute. It construed the statutory language as designating actions which may not be enforced in New York, but not as abolishing an action on a judgment rendered in a sister state and involving an underlying claim not enforceable in New York. The Court rejected an argument based on the fact that the defendant's answer alleged that many of the acts complained of in the Vermont suit took place in New York. This pleading did not place the issue before the Court, it said, nor did the record substantiate the charge.

Two judges dissented on the ground that the statute was applicable because the answer stated that the Vermont complaint alleged that many of the acts had taken place in New York.

(Parker v. *Hoefer,* New York Court of Appeals, April 12, 1957, Dye, J. 2 N.Y. 2d 612, 142 N.E. 2d 194, 162 N.Y.S. 2d 13.)

Labor Law . . .

hot cargo

Hot-cargo clauses in labor contracts are likely to remain a hot issue in view of a recent decision of the Court of Appeals for the Second Circuit. The Court denied enforcement of a National Labor Relations Board unfair labor practice order against two milk drivers locals which, invoking hot-cargo clauses in their contracts, refused to handle the products of a dairy manufacturer and processor with whom the union was engaged in a labor dispute.

In each instance there was a hot-cargo clause in the contract with the secondary employer—a provision under which the contract was not violated if employees refused "to handle material in the possession of the employer received from any employer with whom (the local) is directly engaged in a labor dispute". In each instance the local gave the notice required to the employer under the hot-cargo clause and the employees refused to handle the goods. The employers did not acquiesce, but at the same time, the Court found, there was no evidence of union coercion.

Adhering to its decision in *Rabouin* v. *NLRB,* 195 F. 2d 906, the Court declared the element of coercion was necessary to find the refusal to handle hot cargo an unfair labor practice under the Taft-Hartley Act. "Where the employees are encouraged only to exercise a valid contractual right to which the employer has agreed there is no coercion", the Court said. "Normally the secondary employer receives something at the bargaining table in exchange for granting the hot-cargo clause, and he is no more coerced when the employees subsequently exercise their privilege than a landowner is coerced when those to whom he has granted licenses cross his land."

The Court examined and found wanting the recent approaches of the NLRB to the hot-cargo clause. It particularly demurred from the latest position of the Board that it is an unfair labor practice under the Act for a union to enforce a hot-cargo clause by appeals to the employer and concerted action against him.

Rejecting the contention that a hot-cargo clause promotes a secondary boycott in violation of Taft-Hartley, the Court said: "We also do not accept the argument that hot-cargo clauses are against public policy. The advocates of this view ignore the statutory language to talk about 'secondary boycotts' and the undoubted Congressional dislike of them."

(Milk Drivers and Dairy Employees Local Union v. *NLRB,* United States Court of Appeals, Second Circuit, June 19, 1957, Clark, C. J.)

Military Law . . .

jurisdiction

A United States overseas serviceman who commits a criminal offense while on duty is entitled to a trial under military law and cannot be delivered to the authorities of the foreign nation pursuant to a treaty for trial under its laws even though the foreign power has con-

current jurisdiction of the offense. This is the decision of the United States District Court for the District of Columbia in the *Girard* case.

Girard was accused of accidentally causing the death of a Japanese woman by firing an expended cartridge shell at her to frighten her away from a firing range in a maneuver area provided by the Japanese government for the part-time use of American forces. The key finding of the Court was that Girard was on official duty at the time he committed the offense—a finding flowing from the certificate of Girard's commanding officer and the concession by the Government attorney at the hearing that such was the fact.

The administrative agreement concluded between the United States and Japan provides that where there is concurrent jurisdiction of the military authority and Japan, the United States shall have the primary right to exercise jurisdiction in relation to any offenses arising out of any act or omission done in the performance of official duty. It was under this provision that Girard's commanding officer issued the on-duty certificate, and the United States subsequently claimed jurisdiction.

The duty status of Girard was questioned by Japan, however, and negotiations ensued. The administrative agreement also provides that the "authorities of the state having the primary right shall give sympathetic consideration to a request from the authorities of the other state for a waiver of its right in cases where the other state considers such waiver to be of particular importance". It was under this section that the United States later relinquished jurisdiction to Japan.

Then, while still held by the Army, Girard filed his petition for a writ of habeas corpus.

The Court denied the issuance of a writ, but treated the petition as a complaint for a declaratory judgment and injunction, and, thus viewing the case, enjoined the delivery of Girard to the Japanese authorities for trial because it would violate his rights guaranteed by the Constitution.

The basis for this holding came from the constitutional provision that Congress shall have the power "to make rules for the government and regulation of the land and naval forces". This Congress has done by the Uniform Code of Military Justice, the Court continued. Accordingly, the Court concluded, since the offense was committed while the accused was performing official military duties, he is entitled to a trial by an American court martial under the procedures of the Uniform Code.

(*Girard* v. *Wilson*, United States District Court, District of Columbia, June 18, 1957, McGarraghy, J.)

(EDITOR'S NOTE: On July 11, 1957, the Supreme Court of the United States, reviewing directly under 28 U.S.C.A. §1254(1), reversed the judgment of the district court in the *Girard* case. Holding that Japan, as a sovereign nation, has exclusive jurisdiction to punish for offenses against its laws within its boundaries, unless it has surrendered its jurisdiction, the Court declared that Japan's surrender of jurisdiction must be construed within the provision stating that the state having primary jurisdiction "shall give sympathetic consideration" to a waiver request from the other state. The Court continued: "We find no constitutional or statutory barrier to the [waiver of jurisdiction] provision as applied here. In the absence of such encroachments, the wisdom of the arrangement is exclusively for the determination of the executive and legislative branches."

Treaties . . . *reservations*

The Court of Appeals for the District of Columbia Circuit, with one judge dissenting, has cleared the way for the Federal Power Commission to consider the application of the Power Authority of the State of New York for a license to construct a power project on the Niagara River. To accomplish this the Court ruled that a reservation attached by the Senate to a 1950 treaty between the United States and Canada was void because it dealt with essentially domestic law of the United States and was thus beyond the treaty-making power.

The treaty provides for a division of the waters of the Niagara River between the United States and Canada. In advising and consenting to the ratification of the treaty the Senate attached a reservation "expressly [reserving] the right to provide by act of Congress" for the use and development of the waters made available to the United States, and providing further that "no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by act of Congress". Feeling that the reservation was a part of the treaty and therefore the "supreme law of the land" under the Constitution, the FPC refused to entertain the Power Authority's application for a license in the absence of congressional legislation.

This, the Court decided, was an erroneous view of the reservation. The Court noted that all parties concerned with the treaty regarded the reservation as concerning only the domestic law of the United States, and that Canada accepted the reservation because its provisions concerned only "internal application of the treaty within the United States". A true reservation, the Court said, to become part of a treaty, must be one that alters the effect of the treaty as between the parties. The present reservation did not have this effect, the Court continued, because "neither party had any interest in how the share of the other would be exploited, nor any obligation to the other as to how it would exploit its own share".

By construing the reservation "as an expression of the Senate's desires and not a part of the treaty", the Court avoided ruling on the constitutional question of whether domestic law can be in effect enacted under the guise of the treaty-making power. In this aspect of the case it

noted the opinions of John Foster Dulles and Charles Evans Hughes that the treaty-making power may deal only with matters of international, as distinguished from domestic, concern and scope. The Court said that if the reservation were construed as an integral part of the treaty, the constitutionality of the entire treaty might well be in doubt.

The dissenting judge, citing *Missouri* v. *Holland*, 252 U.S. 416, for the proposition that treaties may contain provisions affecting local law within a nation, declared that the Senate clearly had conditioned its consent to the treaty on the inclusion of the reservation and that it should therefore be given effect. To him the reservation was valid because it was "inspired by, an outgrowth of, and inextricably connected with, an admittedly valid subject matter of a treaty".

(Power Authority of the State of New York v. *Federal Power Commission*, United States Court of Appeals, District of Columbia Circuit, June 20, 1957, Bazelon, J.)

What's Happened Since . . .

▪ On June 17, 1957, the Supreme Court of the United States:

REVERSED (8-to-1, with opinion by Mr. JUSTICE BLACK) *U.S.* v. *Korpan*, 237 F. 2d 676 (43 A.B.A.J. 353; April, 1957), decided by the Court of Appeals for the Seventh Circuit. At issue was whether a pinball machine which redeemed free games in cash is a "so-called 'slot' machine" within the meaning of the Internal Revenue Code's §4462(a) and thus subject to a $250 annual license, or whether it is just a plain, old-fashioned coin-operated amusement device subject to a $10 tax. Korpan was convicted in the district court of failing to pay the $250 rate. The Seventh Circuit reversed. The Supreme Court in turn reversed the Seventh Circuit, holding that a cash-for-free-games pinball machine is a gaming device and can be considered a "so-called 'slot' machine".

DENIED CERTIORARI in *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156 (43 A.B.A.J. 450; May, 1957), leaving in effect the decision of the Court of Appeals for the Fifth Circuit that a 1954 amendment to the Louisiana Constitution basing racially segregated schools on the police power does not prevent such provision from violating the Fourteenth Amendment, and that Louisiana's pupil assignment law, giving school superintendents authority to determine the school each child shall attend but establishing no standards for determination, is invalid.

▪ On June 24, 1957, the Supreme Court of the United States:

AFFIRMED (5-to-4, with opinion by MR. JUSTICE FRANKFURTER) the ruling of the New York Court of Appeals in *Brown* v. *Kingsley Books, Inc.*, 1 N.Y. 2d 177 (42 A.B.A.J. 768; August, 1956), that a New York statute which authorizes an injunction against the sale and distribution of material found after trial to be obscene does not constitute a prior restraint on publication in violation of the First Amendment and that the statute's provision for a post-trial seizure and destruction of the material is valid.

AFFIRMED (6-to-3, with opinion by MR. JUSTICE BRENNAN) the ruling of the Court of Appeals for the Second Circuit in *U.S.* v. *Roth*, 237 F. 2d 796 (42 A.B.A.J. 1157; December, 1956), that the federal obscenity statute, 18 U.S.C.A. §1461, is a proper exercise of the postal power and is not void for vagueness. The Court held that obscenity is not within the area of constitutionally protected speech or press and that the proper standard of obscenity is whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient interest.

AFFIRMED (6-to-2, with opinion by MR. JUSTICE BLACK) the decision of the New York Court of Appeals in *Vanderbilt* v. *Vanderbilt*, 1 N.Y. 2d 342 (42 A.B.A.J. 1050; November, 1956) that a New York statute permitting a court to grant support to a wife even though the husband has obtained a valid out-of-state divorce in a court not having jurisdiction of the wife's person does not violate the full faith and credit clause of the Federal Constitution. The New York Supreme Court Appellate Division, First Department, had reached the same conclusion, 147 N.Y.S. 2d 125 (42 A.B.A.J. 353; April, 1956).

VACATED JUDGMENT in *Bryan* v. *Austin*, 148 F. Supp. 563 (43 A.B.A.J. 547; June, 1957), in which the United States District Court for the Eastern District of South Carolina had declined to make a determination of the constitutionality of a South Carolina statute barring members of the National Association for the Advancement of Colored People from employment by the state or any school district. The Supreme Court declared the cause was moot because of the repeal of the act and the enactment of another statute. The case was remanded with leave to amend pleadings "either to safeguard any rights that may have accrued . . . by virtue of the operation of the repealed act or to set forth a cause of action based on the operation of the new act".

REVERSED *U.S.* v. *Hunt*, 146 F. Supp. 143 (43 A.B.A.J. 353; April, 1957), decided by the United States District Court for Minnesota and holding that a pinball machine which gives the player an option of receiving money instead of free games is an amusement device for federal taxation purposes rather than a slot machine. The case was reversed in the light of the decision of the Supreme Court on June 17, 1957, in *U.S.* v. *Korpan*, noted above.

AFFIRMED the decision of the Supreme Court of New Jersey in *Addams Newark Theater Company* v. *City of Newark*, 126 A. 2d 340 (43 A.B.A.J. 260; March, 1957) that a Newark anti-strip-tease ordinance does not violate the First Amendment, in the absence of a complaint as to the application of the statute to a specific performance or set of circumstances.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

The drive for uniformity in state laws has manifested itself in several ways, ranging from the now repudiated doctrine of Swift v. Tyson through the restatements of the American Law Institute to the efforts of the Commissioners on Uniform State Laws. The effect of the work of the Commissioners is discussed by one of their number, who is also Research Professor of Law in the University of Oklahoma and a widely known scholar in many fields of the law.

Uniform Laws—Unattained Ideal

by Maurice H. Merrill

The table of adoptions in the 1956 Handbook of the National Conference of Commissioners on Uniform State Laws covers fifty-two American jurisdictions, forty-eight states, the District of Columbia, the Territories of Alaska and Hawaii and the Commonwealth of Puerto Rico. It lists sixty-nine drafts of acts currently approved by the Conference and recommended to the states for adoption on a uniform basis. Of these, two, the Uniform Negotiable Instruments Act and the Uniform Warehouse Receipts Act, have achieved enactment by all jurisdictions. Parenthetically, it may be noted that these two now are on the Conference's list of withdrawn acts, since they have been superseded by the proposed Uniform Commercial Code, operative to date in Pennsylvania only. But twenty-one of the sixty-nine drafts have been enacted in as many as one half the jurisdictions. Approach the matter from another aspect: only Wisconsin (57) and South Dakota (52) have taken as many as fifty of the Conference's proposals for uniform laws. Half a dozen other commonwealths have forty adoptions on their books: Maryland, 45; Pennsylvania, 45; Utah, 44; Michigan, 42; Nevada, 41; Tennessee, 41. Such important states as California (37), Illinois (36), Indiana (30), Iowa (24), Massachusetts (27), Missouri (26), New Jersey (30), New York (34), North Carolina, (29), Ohio (25) and Virginia (26) have been highly selective in their choices. Proposals by the Conference definitely do not become, automatically, a body of uniformly adopted law.

Take up the set of Uniform Laws Annotated, containing the texts as promulgated in the states. Examine the notes which indicate the variations from the text of the uniform drafts as enacted in particular states. As to almost every act, you will find some diversities noted. These take the form of added or omitted sections or of changes in the text of a particular section. Some seem rather clearly to be the result of careless legislative practices. In such instances, it is not uncommon later to find corrective amendment. But, in most cases, the particular legislature, for one reason or another, has felt that it could improve on the Commissioners' draft and was not restrained in its zeal for betterment by the desire for uniformity. Every Commissioner on Uniform State Laws who has presented a draft to legislators has experienced this tendency to undertake improvement of the handiwork of the Conference.

Still another source of *de facto* diversity in uniform laws arises from variant judicial interpretation. The standard practice of the Conference is to include in each draft a section invoking construction which will effectuate the objective of uniformity of law among the enacting states. Obviously, this often will be a "wish that failed of fact". Statutes, like constitutions, mean what the judges say they mean. A court, convinced that its counterpart in another state has misread completely the words of the Conference, well may feel that the Commissioners would prefer achievement of their true objective to unanimity in error.

How may the ideal of uniformity in law be achieved more nearly? So far as legislative acceptance of uniform drafts is concerned, it may be that the Conference itself has misjudged the market for acts in some instances. That the Uniform Property Act, promulgated in 1938, has been adopted only in Nebraska suggests that the states were not waiting with bated breath for an act modernizing the law of real property. On the other hand, it may mean that the commissioners and the persons most familiar with the field have not done a good job of letting the legislators know of the act's advantages.

The Conference is awake to the need for better screening of proposals for uniform acts. Through its Committee on Scope and Program, whose recommendations are reviewed by the Executive Committee, it attempts to insure that not only is there need for a proposed uniform act but that this need is sufficiently recognized to assure a reasonably wide adoption of a good draft. Frequently, also, a special committee is appointed to inquire specifically into this aspect before drafting is undertaken.

The problem of "selling" the acts to the legislators offers more difficulties. Originally, the commissioners definitely were expected to function as lobbyists for the adoption of their products. This idea still survives in the formal statement of the duties of commissioners. In practice, this is not always achieved. Since the policy of the Conference has been to procure legislative authority for the appointment of commissioners

and public appropriations for their support, pyretic advocacy of uniform measures is less proper and less effective. Many commissioners, by position or by temperament, are not able effectively to assume the role of legislative advocate. More can be accomplished through seeking the aid of groups interested in particular legislation and through programs of education.

The effectiveness of advocacy by interested groups in securing the enactment of uniform laws is well illustrated by the fact that the Uniform Gifts to Minors Act, promulgated in 1956, achieved adoption by so many legislatures in 1957. Securities dealers, bankers, and many other persons interested in this new and convenient method of putting securities in the hands of minors united in convincing the legislators of its merits. Conversely, the road to enactment frequently is obstructed because influential groups oppose the measure. The Commercial Code, despite the painstaking care which went into its drafting and the efforts which were made to give all interests an opportunity for hearing, has been adopted in Pennsylvania alone, largely because of vociferous and determined opposition by certain groups who had been unable to get approval of their special views. The Uniform Disposition of Unclaimed Property Act and the Uniform Contribution Among Tortfeasors Act have suffered also from determined opposition by particular groups.

Educational activity on behalf of uniform drafts takes many forms. Commissioners frequently are able to address professional and business associations, informing them of measures of interest to such groups. Where official standing is accorded the commissioners from the state, official reports to the executive and the legislative branches afford informative means. If there is a legislative council, a law revision committee or some other body charged with studying between legislative sessions the need for statutory enactment, this furnishes a very useful medium for publicizing the availability and the merits of uniform legislation. In some states the bar associations have committees to study legislative proposals. Through these committees, it is possible to secure study of the drafts of the Conference and advocacy of those measures which achieve approval. More intensive use of these various informational methods should result in a greater awareness of the availability and usefulness of the various uniform drafts.

With respect to variation in enactment, there may be less prospect for betterment. After all, it is the legislature in each state, not the Conference, that is the official guardian of public policy. Certainly, a legislator cannot very well be told that he must take or leave a Conference draft as he finds it. If that is attempted, the odds are that he will leave the measure rather than take it. The best solution probably is to build up, over the years, a sense of the advantage of uniformity of law in areas of multi-state interest. Representations with respect to a particular bill are of little effect upon a legislator who thinks he has discovered a remediable defect or who dislikes strongly a specific provision. The Conference, too, must be alert to the possibility of presenting alternative drafts in respect to matters as to which there may be room for difference of policy without harm to the general objective of uniformity. It must be alert to those institutional and social variances among the states which require diversity of provision. Its deliberations show an increasing awareness of this need. Also, it may be well to pay more attention to the drafting of model legislation rather than to make most of its proposals in the form of uniform drafts.

Diversity of judicial interpretation is the most difficult of all sources of variance to cure. The nature of the judicial function and the independence of the judiciary make it impossible to solve the problem by fiat. Representations before judicial conferences may be of aid in creating reluctance lightly to initiate a conflict in authority. Much more can be done by attention, in the drafting stage, to avoiding ambiguity and obscurity in language, as the 1956 Report of the Conference's Standing Committee on Uniformity of Judicial Decisions points out. But to this there are limits. Much diversity of decision does not arise from defective draftsmanship. The conflict of opinion under the Uniform Negotiable Instruments Law as to the availability of the suretyship defenses to the surety-maker was invited, almost compelled, by the poor quality of the first decision on that point, *Cellers* v. *Meachem*, 49 Ore. 186, 89 Pac. 426 (1907), embodying what most commentators regard as a rank misconstruction of the statute. And within the last few years, over a strenuous dissent, a bare majority of the first court to pass upon the propriety of collateral attack on void decrees of divorce under the Uniform Divorce Recognition Act, completely and deliberately, as both the majority and the minority decisions clearly show, ignored the plain meaning of the draftsmen on that point. *Dahlberg* v. *England*, 45 Wash. 2d 708, 277 P. 2d 717 (1955). Such a decision either requires that other jurisdictions decline to follow it or that the Conference amend the misconstrued section and ask the adopting legislatures to close the door upon the misconstruction. Aside from the delay involved, there really can be no certainty that this cure will be effective. Opinions die hard and untwistable language is difficult to come by. Perhaps it is better to let the erring brethren go their way, seeking instead to dissuade others from following them, even at the cost of some diversity.

Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, George D. Webster, Chairman.**

The Trade Association Tax Exemption: Current Issues

by John J. Kelley, Jr., Cincinnati, Ohio

Section 501 (c) (6) of the Internal Revenue Code of 1954 exempts from the federal income tax several classes of corporations and associations. Included within this group of tax-exempt entities are business leagues (including trade associations), chambers of commerce, real estate boards and boards of trade. The practical effect of this exemption is to render dues and assessments non-taxable income. And such an exemption is relevant to but not completely determinative of the deductibility of the dues, assessments and contributions involved.

The several criteria for exemption as a business league have been in the statutory scheme since its inception in 1913 and have been completely analyzed elsewhere.[1] It is not intended here to catalogue the various activities or services in respect to which exempt status has been granted or denied. In general, to qualify for such exemption, a trade association must be organized on a non-profit basis and no part of its net earnings may inure to the benefit of any private individual or shareholder. An excellent statement of the requisites for exemption are set forth by Judge Kern in *Associated Industries of Cleveland,* 7 T.C. 1449 (1949), and may be grouped as follows:

(1) A business league must be an association of persons having a common business interest, with a purpose to promote that interest, and its activities should be directed toward the improvement of conditions in one or more lines of business.

(2) It should not be organized for profit or should not be engaged regularly in a business ordinarily carried on for profit.

(3) No part of its net earnings should inure to the benefit of any private shareholder or individual.

In all of the administrative and judicial decisions holding trade associations exempt, the organization involved was composed of businessmen or companies in a competitive relationship with one another, sharing a common denominator of interest, who had joined together to improve business conditions generally while still maintaining the competitive relationship. See *National Leather and Shoe Finders Association,* 9 T.C. 121 (1947).

A trade association cannot obtain an exempt status for federal income tax purposes if formed or operated with an explicit profit objective, or if it carries on a business regularly engaged in for profit, indirectly demonstrative of a profit motive. As to this qualifying factor, the cases on the whole provide a fairly definite line of demarcation between the exempt and the non-exempt. An association which is formed by business concerns to carry on an ordinary type of business or to furnish to members a type of service which can ordinarily be secured from concerns operated for a profit is denied exemption. On the other side of the line are cases where a genuine trade association exists and where exemption is granted notwithstanding the fact that members may enjoy and receive individual benefits and services from the association. See *Clay Sewer Pipe Association Inc.* v. *Commissioner,* 139 F. 2d 130 (3d Cir. 1943).

A third requisite for a trade association's exemption is that no part of its net earnings inure to the benefit of any shareholder or individual. This, of course, is in accordance with the general mandate and explicit language of the statute directing that a group generally, rather than particular individuals or particular companies, is to receive the benefit of the tax exemption. The proscribed inurement includes special services at reduced rates, actual dividends or a reduction in dues because of profits made from sales to non-members or because of profits made from a business regularly carried on for profit. See *National Automobile Dealers Association,* 2 T.C.M. 291 (1943); Rev. Rul. 56-65, 1956-1 C.B. 199.

Other than cases arising in connection with these primary requisites for exemption, there are three other areas of current relevance.

Publicity and Inspection of Exemption Applications, etc. Applications for exemption as a trade association are filed on Form 1024. Once the exemption ruling issues, a Form 990 must be filed annually and in addition, if the facts warrant, Form 990-T must be filed containing data for determination of the organization's liability for the tax on unrelated business income (Sections 511-514). Under present law, neither the application nor the returns are open to the public for inspection. Under the proposed "Technical Amendments Act of 1957" (H.R. 8381)[2], the Form 1024 (including both those filed in the past and in the future), together with any material submitted in support of such application, would be open to the public for inspection. This of course

1. Casey, *Federal Tax Exemption of Trade Associations—A Current Appraisal,* 9 A.S.A.E.J. 19 (1937); Lamb and Kittelle, TRADE ASSOCIATION LAW AND PRACTICE, pages 228-254 (1956); Webster, *The Permissible Scope of Trade Association Activity—Taxwise,* 8 A.S.A.E.J. 45 (1956).

2. Introduced by Representative Wilbur Mills on June 26, 1957. The introduction of this proposed bill comes after a year's work by the Subcommittee on Internal Revenue Taxation of the House Ways and Means Committee. See H. Rep. No. 775, pages 41-43 (July 9, 1957).

would contain the purposes, activities, organizational data and financial aspects of the association. The proposal is directed primarily to the controversial "educational" organization in the Section 501(c) (3) area, see 42 A.B.A.J. 773-774 (1956), but as presently drafted also covers trade associations.

Statute of Limitations. The recent case of *Automobile Club of Michigan* v. *Commissioner*, 77 S. Ct. 707 (1957), resolved the 1939 Code issue as to the effect of the filing of the Form 990. The Court held that such an information return did not initiate the running of the statute of limitations. Accordingly, an exemption ruling could be revoked effective for years prior to the time when the statute of limitations would have otherwise precluded such action.

For 1954 and subsequent years, Section 6501 (g) (2) changes this result. Under this section, if a taxpayer determines in good faith that it is an "exempt organization", the filing of the Form 990 does start the running of the statute of limitations. It should be noted that this section places upon the organization the burden of making a determination in good faith that it is exempt.[3]

Influencing legislation. There is no requirement by statute or regulation that a trade association, in order to be considered exempt, refrain from carrying on propaganda or seeking to influence legislation. Such a limitation (as a substantial activity) is only applicable to an organization operated for religious, charitable or educational purposes within the meaning of Section 501-(c) (3). Presentation of information, trade statistics and group opinions to government committees and bureaus is one of the essential functions of many trade associations. See *Report of Special Committee To Investigate Political Activities, Lobbying, and Campaign Contributions*, pages 42-46, 221-236 (1957). This has been a factor in a number of judicially approved trade associations, including those in the following cases: *Chicago Graphic Arts Federation, Inc.* v. *Commissioner*, 128 F. 2d 424 (7th Cir. 1942); *Leaf Tobacco Exporters Association, Inc.* 10 T.C.M. 706 (1951); and *American Refractories Institute*, 6 T.C.M. 1302 (1947). In fact many trade associations have specifically designated legislative committees.

However, as in other areas of the federal tax law, the income (exemption) aspects and the deduction (dues) aspects of the taxing scheme are mutually exclusive. Dues and assessments paid to regular trade associations have almost uniformly been allowed as ordinary and necessary expenses. However, the Commissioner has prevailed in the disallowance of dues paid to an association the primary purpose of which was to influence legislation. *American Hardware and Equipment Company* v. *Commissioner*, 202 F. 2d 126 (4th Cir.), *cert. den.*, 346 U.S. 814 (1953). This result was reached even though the association involved had received an exemption as a Section 501 (c) (6) organization. This might indicate that the "public policy" argument sometimes used effectively by the Commissioner on the deduction side is inapplicable to the exemption question. For instance, a trade association involved in a Robinson-Patman violation should not have its tax exemption revoked. At least, this should be the result if the "illegal" aspect is not a substantial part of the association activity. Rev. Rul. 54-442, 1954-2 C.B. 131.

In any event, the Commissioner's efforts to disallow the deduction of assessments made to the usual trade association have failed. In one case, *Addressograph-Multigraph Corporation*, 4 T.C.M. 147 (1945), he sought to disallow the deduction of assessments paid by a corporation to the National Association of Manufacturers on the ground that the amounts so paid constituted a contribution to an organization which was carrying on propaganda or otherwise seeking to influence legislation. The deduction was allowed, however, since this was not the major purpose of the organization. A similar result has been reached in the case of the United States Chamber of Commerce. *Smith-Bridgman & Company*, 16 T. C. 287 (1951).

The most recent effort of the Commissioner in this area is that he has been seeking to disallow a deduction for membership dues to a trade association in the same ratio that the "lobbying" activities of the association bear to its total activities. For instance, if 7 per cent of an association's activities constitute lobbying, then 7 per cent of the dues will be disallowed as a deduction. A suggestion of such an approach was made in Note, 67 *Harv. L. Rev.* 1408 (1954), and subsequently in Rev. Rul. 54-442, *supra. Cf. Los Angeles & S.L.R.R.*, 18 B.T.A. 168, 177 (1929), where the Commissioner unsuccessfully advocated such treatment. The issuance of the final Treasury Regulations under Section 162 of the 1954 Code has been held up for over a year partly because of the indecision of the Service on this point. However, to be consistent, it would seem that the Service should and will disallow a portion of the dues paid to any organization of labor or management to defray lobbying activities.

The pattern of federal tax exemption established by Section 501 (c) (6) for trade associations has conclusively demonstrated its merit. In addition to many other results, the exemption has been an immense aid to small business; the smaller company, unable to conduct many of the activities of the association, benefits extensively even though the activities are in large part financed by the larger companies (because of the usual procedure of basing dues and assessments on a "volume of business" basis. See *Directory of National Trade Associations*, published by the Department of Commerce.) It is plain, therefore, that the current factors discussed *supra* should not be permitted to dilute or otherwise adversely affect this exemption.

3. H.R. 8381 (Sec. 70) proposes to extend this relief to any "organization". It is now available only to a "corporation".

BAR ACTIVITIES

Charles Ralph Johnston • Editor-in-Charge

A revitalized Columbus (Ohio) Bar Association with 300 members and a bank account of $2,000 came to life in 1947. The Association was originally organized in 1869. The determination of the organization to employ an executive secretary signaled the necessity for adequate space. The only available space was a beer storage room (7 feet by 7 feet) on the mezzanine floor of the Virginia Hotel—rent free. This unpretentious space was necessary because, while the reorganization group had a great amount of zeal, they had limited funds. An agreement was made to hold weekly luncheons in the Virginia Hotel dining room in exchange for the office space. The bank account was improved when dues were raised from $3.00 per year to $20.00 and the Association published a bar directory on which it made several thousand dollars profit.

Ensconced among the mimeograph machine, storage cabinet, desk and typewriter, the new executive secretary, Miss Margaret McNamara, began slowly but surely to demonstrate the desirability of a full-time director of activities. As the benefits of a well organized Bar began to manifest themselves, the work-load began to increase and the space in the beer storage room diminished each week. After four months in this location, the Association faced the inevitable —more space and a new office. The Association work now required a stenographer as well as an executive secretary and more equipment.

After a year, a committee was delegated to find adequate space to take care of future expansion. With office space in downtown Columbus still at a premium in 1948, the committee by judicious exercise of influence and pressure found in the Huntington National Bank Building what appeared to be more than adequate office space for the needs of expanding activities for a long time in the future—two offices and a large storage closet for the executive secretary and two stenographers. The original membership of 300 had grown to approximately 700. Surely now space, equipment and employees were at the maximum!

But there was another factor to face—the constant driving of forty committees and officers to increase membership, to increase efficiency, to seize upon more and more projects soon taxed the facilities of the office and what had seemed sumptuous space began to look like the old beer storage room.

Once again a committee was directed to seek adequate space which would take care of the functions of the Bar Association. The Scope and Correlation Committee then recommended larger headquarters and also suggested that the new offices be on the street level to increase the use of the Lawyer Reference Service. A suite of three offices, including 800 square feet, was leased, with option to renew, in a centrally located downtown office building. The Association now had adequate space to fill a long-felt need—a place in which to hold committee meetings, which was important as the reorganization of the Association had been built on committee work. Nearly every day one or two committees met. The Columbus Bar now had a handsome and efficient office for its executive secretary, excellent space in which to hold committee meetings, a separate office for two full-time stenographers and one part-time stenographer handling the Lawyers Reference Service, Legal Aid, secretarial work of the forty committees, photostatic service of police traffic records, notary commissions for the courts, to mention only a few of their many duties. The office also included a large room for the mimeograph machine, an addressograph machine, photocopy equipment, large stacks for supplies, forms and pamphlets, and some ten filing cabinets accumulated by this time, and all of the other paraphernalia, equipment and just plain "stuff" necessary for efficient operation.

Things went smoothly for nearly

Columbus Bar Association Headquarters and Executive Secretary Margaret McNamara

three years, then progress and prosperity took its toll. The old buildings to the west were purchased by an insurance company. There was anticipation of the development of this area somewhat marred by the dust, debris and noise necessitated by the razing of the buildings occupying the lot. At least at that time the staff thought that this would be the only disturbance to mar a heretofore peaceful and satisfied existence. There were, however, other things. A slight miscue by the wrecking crew sent a large piece of stone wall through the window and onto the desk of the executive secretary. From this point on things progressed from bad to worse. Once again a new committee was appointed to find adequate space to house the staff and equipment now and "for a long time in the future".

The idea and problems of a headquarters building were discussed at great length and it was finally determined that financing a building was too difficult at that time. It was determined that the idea would not be abandoned, but postponed and another space rented. This decision was made easier by the discovery of space in the University Club Building, one floor below the University Club.

The new offices were decorated in turquoise and green, which make a pleasing background for the walnut office furniture that had been purchased by budgeting $500 each year for office furniture and equipment. Partitions of plywood and glass were put up to provide semi-private offices for the stenographers, who do most of the interviewing of clients of Lawyers Reference Service and Legal Aid.

The conference room and executive secretary's office is an L shaped arrangement. Blocks of chinese grass wallpaper entirely cover one wall. The most startling is the panel wallpaper back of the executive secretary's desk; this is a scene of palm trees and water that might very well be seen in southern Florida or Bermuda.

Here small committees can feel as comfortable as large committees of twenty-five or thirty. Folding chairs are kept in the work room and can be used when there are large groups meeting.

For the first time this year, committees are sponsoring seminars in specialized fields. These two-hour meetings fill a need for legal education which cannot be filled at the weekly luncheon meetings of the Association at which time the speaker has only thirty-five minutes. These seminars are held in the Association Conference Room.

The Association does not need space for a library as an excellent one is available across the street from the Association in the Supreme Court Law Library.

This year the Columbus Bar again won the American Bar Association Award of Merit for outstanding services to its members and to the public. This is the eighth award to this Association in the last ten years—four from the American Bar Association and four from the Ohio State Bar Association.

Starting on a shoestring, this now successful Association is the culmination of good ideas, hard work and a sense of direction toward the ends desired. The lawyers of the Columbus Bar Association have succeeded in creating a dynamic and growing organization. Columbus has shown what any group of lawyers can do if they really have ambitious ideas and are willing to work toward those goals.

EDITOR'S NOTE: Miss Margaret McNamara is leaving the Columbus Bar Association to marry Richard C. Addison, of Columbus, a past president of the Association. The Association's loss is Mr. Addison's gain, for to her work as Executive Secretary the officers of the Association say she applied intelligence, tact, industry and loyalty. These admirable qualities will stand her in good stead in her new venture and she leaves the Columbus Bar Association with the regret, gratitude and good wishes of all who knew her.

Bon voyage, great happiness and success to Margaret McNamara and to Richard C. Addison!

The American Bar Association, meeting in New York in July, announced the 1957 Awards of Merit to state and local bar associations for outstanding programs of activities. The top award went to the State Bar of Michigan among the large state associations.

The Michigan Bar won the coveted award for several projects, including a unique "Annual Legal Check-up" plan designed to protect the legal interests of clients on a continuing basis. The citation also mentioned the Michigan Bar's successful campaign for funds to erect a new headquarters building in Lansing, and its "general excellence of service to the bench, bar and public".

Among smaller state bar associations (those having less than 2,000 members) the highest award went to the State Bar of North Dakota for leadership in developing new state court rules of civil procedure, for its legislative program and for "its outstanding program of legal institutes and sectional meetings and for initiating a vigorous Lawyer Reference program".

In the large state bar association category, won by Michigan, the awards committee cited three others for honorable mention. They were:

State Bar of California—For its excellent legislative program; for its pre-trial demonstration films, and for its program of continuing education for members of the Bar.

The Florida Bar—For its American citizenship program of lectures by bar members to high school students, including an officially approved lecture on "The Meaning of Communism" and for its successful support of the Florida court reorganization program approved by the voters in a recent statewide referendum.

The Missouri Bar—For its successful defense of the so-called "Missouri

Plan of court reform" from "organized attack"; for its "excellent public information program" and for its program of state bar reorganization.

In addition to the two categories of state bar associations, the awards competition included three divisions for city or county bar associations. Awards in these divisions were:

Division II A (over 800 members) —First award, Columbus (Ohio) Bar Association, for its educational film program, and for aid to newly admitted lawyers. (No honorable mentions).

Division II B (100 to 800 members) —First award, Onondaga County Bar Association, Syracuse, N.Y., for its 'Salute to Youth' program to combat juvenile delinquency. Honorable mention citations went to: Waco-McLennan County Bar Association, of Waco, Texas, for its "excellent traffic court improvement program" and to the Allen County Bar Association, of Fort Wayne, Indiana, for its "well-rounded and coordinated program of services to the public and the bar."

Division II C (under 100 members) —First award, Sonoma County Bar Association, Santa Rosa, California, for its program of public education as to the role of the Bar in society, and for its activities to combat unauthorized practice of the law. Honorable mention went to Columbus Lawyers Club, Columbus, Georgia, for its campaign to raise standards of legal education.

All of the awards were presented to officials of the winning associations on Monday, July 15 at the opening session of the 80th annual meeting in the Grand Ballroom of the Waldorf-Astoria. The awards were made by the Section of Bar Activities, with Archibald M. Mull, Jr., of Sacramento, California, as chairman of the judging committee.

James G. NYE

The 1957 Annual Meeting of the Minnesota State Bar Association was held in Duluth on June 19, 20 and 21, in conjunction with the Eleventh Judicial District Bar Association, of which John M. Donovan, of Duluth, is President, acting as the host organization. President John B. Burke presided.

James G. Nye, of Duluth, is the newly elected President, and Luther M. Bang, of Austin, is the new Vice President. James D. Bain, of Minneapolis, and Earl N. Anderson, of St. Paul, were re-elected Secretary and Treasurer, respectively.

The Tax Institute under the direction of the Section of Tax Law, dealt primarily with post mortem estate planning and tax aspects of the termination or shifting of partnership interests. Discussions were headed by Everett A. Drake, Verne W. Moss, Jr., and Maynard B. Hasselquist, all of Minneapolis.

Members of the Minnesota State Bar Foundation convened for a business meeting and luncheon. As is the custom, scholarship awards for $125, $75, and a set of Minnesota Statutes and Annotations are made available each year to each of the three law schools in the state for the purpose of encouraging high scholastic attainment on the part of the students entering the profession.

An interesting highlight of the meeting was the Criminal Law Institute sponsored jointly by the Criminal Law Committee, of which A. J. Hoffman, of St. Paul, is Chairman, and the Junior Bar Section, with John G. Robertson, of St. Paul, Chairman. The presentation included the prosecution of a hypothetical adult felony case from the initial police investigation to its final conclusion. This included the roles of the defense attorney and the prosecutor at each stage. C. Paul Jones, Assistant County Attorney of Minneapolis, headed the sub-committee in charge of the Institute.

An institute of the Section of Real Property Law featured a talk by George M. Maloney, of Minneapolis. He discussed the Limitation Statute as construed by the Minnesota Supreme Court. A question and answer period followed his discussion.

The Institute of the Labor Section, directed by Arvid M. Falk, of Minneapolis, attracted a large group of bar association members. Lyman C. Conger, of Kohler, addressed the Section as a "reply" to a speech before the group last year by Walter Reuther of the United Auto Workers. Mr. Conger's address was subject to a barrage of questions by some of the lawyers present, especially those who represent unions.

John HJELLUM

The 57th Annual Meeting of the State Bar Association of North Dakota was held in Bismarck on June 27, 28 and 29, with President Floyd B. Sperry, of Golden Valley, presiding. Three hundred of the approximately 700 members attended.

The newly elected officers are John Hjellum, of Jamestown, President; Arley R. Bjella, of Williston, Vice President; and Elver T. Pearson, of Bismarck, who was re-elected Secretary-Treasurer. Lynn G. Grimson, of Grafton, was re-appointed Executive Director.

New members of the Executive Committee are Arley R. Bjella, by virtue of his office as Vice President; Thomas L. Degnan, of Grand Forks; Robert Chesrown, of Linton; and

LeRoy A. Loder, of Minot.

Fifty-year certificates were presented to eleven members before the General Assembly on the second day of the meeting.

The meeting was devoted primarily to discussions of the new North Dakota Rules of Civil Procedure, patterned on the Federal Rules, which went into effect on July 1.

The Association adopted an Inter-professional Code in conjunction with the medical profession, the general principles of which read in part:

> Where the professions converge in serving the interests of a single patient-client, it is elementary that the service of each profession to that person may be more effective and cooperative if a complete understanding of the philosophy, province, and ethics, as well as the methods employed, for and by the member of each profession in that service be fully understood by the member of the other profession. It is to promote that mutual understanding between the members of the professions, to the ultimate good of their patient-client, that the State Medical Association and the State Bar Association of North Dakota have evolved and adopted this inter-professional code.

The principal speaker at the Annual Banquet was George Grim, of Minneapolis, Minnesota, columnist and radio and TV commentator, who told of his experiences on his recent unguided trip through Russia.

Shirley A. WEBSTER

The Annual Meeting of the Iowa State Bar Association was held in Des Moines on June 5, 6 and 7, with President R. R. Bateson, of Eldora, presiding.

New officers elected to serve during the coming year are Shirley A. Webster, of Winterset, President; and L. L. Corcoran, of Sibley, Vice President. Edward H. Jones, of Des Moines is the Secretary-Treasurer.

Newly elected members of the Board of Governors are Carroll Johnson, of Knoxville; Albert Block, of Davenport; Fey Moody, of Des Moines; and R. A. Rockhill, of Marshalltown.

Taking note of the federal courts in Iowa, the following resolution was passed:

> We note again the critical situation in the administration of justice in the federal courts in Iowa resulting from the lack of a sufficient number of judges to handle the increased judicial business of the courts. This has caused an excessive demand upon the time and energy of the Honorable Henry Graven and the other judges assigned from time to time. It has overcrowded the dockets and prevented the handling of matters before the courts with the promptness and dispatch which litigants have a right to expect and demand from our federal courts.
>
> We, therefore, respectfully urge the executive, legislative and judicial departments of the federal government and the individuals whose responsibility it is to alleviate these conditions to take all available action at the earliest possible time to provide the additional judicial personnel which is so urgently needed in Iowa.

The 46th Annual Meeting of the Massachusetts Bar Association was held in Plymouth on June 15 in connection with the Massachusetts Lawyers' Institute and Convention. President Joseph Schneider, of Boston, presided.

Raymond F. BARRETT

Officers elected to serve during the coming year are Raymond F. Barrett, of Quincy, President; Lincoln S. Cain, of Pittsfield, Livingston Hall, of Concord, Harold Horvitz, of Newton, Bertha R. Kiernan, of Chelsea, and Stanley B. Milton, of Worcester, Vice Presidents; Gerald P. Walsh, of New Bedford, Treasurer; and Frank W. Grinnell, of Boston, Secretary.

A symposium on land damage and eminent domain was one of the most interesting features of the meeting. Participants were Max Rosenblatt, of Malden; J. Burke Sullivan, of Boston; and Alexander S. Beal, who gave the Government's, the petitioner's and the expert appraiser's points of view respectively.

A panel discussion of trial by newspaper had the following as speakers: Dwight L. Allison, Paul T. Smith, both of Boston; Joseph W. Harvey, of the *Boston Globe;* and Casper Dorfman, of the *Daily Record-American.*

Senator John F. Kennedy addressed a luncheon session of the meeting and Senator Leverett Saltonstall was the principal speaker at the Institute dinner. The *Mayflower II* arrived in Plymouth while the Institute was in progress and members attending the dinner had the unexpected pleasure of having the captain of the Mayflower as a guest. He made a brief address and received a citation.

OUR YOUNGER LAWYERS

Kirk McAlpin, Secretary and Editor-in-Charge, Savannah, Georgia

Headed by James S. Cremins of Norfolk, who combines a flair for organization with an apparently limitless capacity for hard work, the Membership Committee has been one of the most productive units of the Conference this year.

During the first five months of the calendar year, over 600 members—approximately one third of the American Bar Association's increase of membership—was obtained by the Junior Bar Conference, and at the time of its report in July, a substantial increase in the number of members was anticipated for the summer.

The Committee has meshed its work carefully with that of other committees to take every possible advantage of their activities to further membership enrollment. It has worked closely with the Membership Committee of the American Bar Association, headed by Thomas E. Taulbee, of Wilmington, Delaware. With that Committee's help, the JBC Fact Brochure has been re-edited, more strongly emphasizing positive benefits accruing to the young lawyer through Conference membership. In co-operation with the Affiliate Units Committee, whose chairman is Paul L. Jaffe, of Philadelphia, efforts are being made to obtain 100 per cent Bar Association membership in those groups. Ralph Franco, of Montgomery, chairman of the Law Students Committee, is publicizing the advantages of Association membership in law schools and soliciting successful law school bar candidates.

Vice Chairman S. David Peshkin is in charge of the program for social affairs in connection with court admission ceremonies.

Lists of newly admitted lawyers have been obtained for thirty-two states and each has been solicited, either personally or by letter.

Appearances and exhibits have been presented at eighteen state annual or mid-year meetings in behalf of Association membership.

Chairman Cremins has recommended changes in the Committee's structure to facilitate its work. He advocates that vice chairmen, each charged with a definite responsibility for a specific phase of the Committee's work, be appointed on a national basis, eliminating Circuit vice chairmen with general supervision of all phases. He is also insistent that state members be appointed well in advance of the change of Membership Committee personnel so that the Committee may get down to work immediately when the new chairman takes charge.

West Virginia's Membership Committee

An outstanding example of enrollment of members has been shown by the West Virginia Junior Bar Section's Membership Committee, under the chairmanship of G. J. Triplett, of Charleston.

The latest phase of their work has been the state's first group admission ceremony, presenting twenty-three lawyers to the West Virginia Supreme Court of Appeals at Charleston on June 11. Included were attorneys graduated from the University of West Virginia in mid-term and in June and lawyers graduated elsewhere who had passed the bar examination given in March. After the ceremony, a luncheon was held in honor of the admittees at the Press Club in Charleston.

New State Officers Announced

Several state Junior Bar Conference units held their annual elections in June, and new officers have been chosen in Arizona, Georgia, Iowa, Tennessee and North Carolina.

New officers for Arizona are Harry T. Goss, of Phoenix, Chairman; George Ireland, of Prescott, Vice Chairman; Robert Parks, of Phoenix, Secretary; and Edith Lazovich, of Yuma, Treasurer.

The new slate for the Junior Bar Section of the Georgia Bar Association is headed by Gould B. Hagler, of Augusta, as President; with Robert T. Thompson, of Atlanta, as Vice President; and Ralph Ivey, of Atlanta, as Secretary.

The Junior Bar Section of the Iowa State Bar Association elected Donald A. Wine, of Davenport, President; S. David Peshkin, of Des Moines, Vice President; and Patrick D. Kelly, of Des Moines, Secretary.

For Tennessee, newly elected officers include R. Lee Winchester, of Memphis, President; Ernest C. Matthews III, President-Elect; John L. Wheeler, of Chattanooga, Vice President; Richard German of Alamo, Vice President; and Jack Henry, of Pulaski, Secretary-Treasurer.

North Carolina announces the election of William E. Poe, of Charlotte, as Chairman; Lawrence McN. Johnson, of Aberdeen, Vice Chairman; and Roger B. Hedrick, of Winston-Salem, Secretary-Treasurer; with an Executive Council composed of John M. Sims, of Raleigh; Ernest E. Parker, Jr., of Southport; William P. Mayo, of Washington; Faison Thompson, of Goldsboro; Horace Kornegay, of Greensboro; Ralph M. Stockton, Jr., of Winston-Salem; Bruce Brown, of Asheville; and Carleton Fleming, of Charlotte.

(*Continued from page 781*)
etc. The limitation on the amount of damages recoverable was placed in the convention in deference to the position, particularly of the insurance companies, that if absolute liability were imposed on international carriers, such liability should be limited. The companies were unwilling to insure carriers whose liabilities were uncertain both as to nature and extent.

The provisions of the Warsaw Convention represent a compromise not only between the adherents of absolute liability and ordinary carrier liability, but also between the civil law approach and the common law approach to this problem. The result, in this writer's opinion, is a contradictory, equivocal and unsatisfactory document, as Mr. Gardner has quite rightly shown. It ought to be made clear, however, that United States representatives had no part in the drafting of the Warsaw Convention. The United States Government took no official interest in the First International Conference on Private Air Law held in 1925, which initiated the drafting of the convention and the establishment of the International Technical Committee of Air Law Experts (CITEJA), which developed the draft used as the basis of negotiation at the Second Conference on Private Air Law in Warsaw in 1929. The United States did, however, have unofficial observers present at the conferences of 1925 and 1929.

The United States adhered to the Warsaw Convention in 1934. It is interesting to note that the Senate approved adherence to this treaty without holding public hearings, and so far as the writer has been able to ascertain, without any formal hearings.

There is no doubt that the provisions of the Warsaw Convention, which under our Constitution are the supreme law of the land, override any state law to the contrary, whether proof of damages, evidence, extent or limits of liability are involved. Although interstate and foreign commerce are subject to regulation by Congress, the liability of interstate and foreign air carriers has not been the subject of federal legislation as such. The Warsaw Convention, drafted in Europe to apply chiefly to European conditions and reflecting general European law, is the carrier liability law for American planes engaged in international transportation between the United States and the countries parties to the convention.

The question of liability under the Warsaw Convention for personal injuries or death is an important one which the writer is not qualified to discuss in its basic aspects, but upon which the following observations might be of interest: Mr. Gardner indicates that it is comparatively easy for the carrier to avoid liability. The convention imposes nearly absolute liability upon the carrier, which, in order to avoid such liability, has the burden of proving that all necessary measures to avoid the damage were taken, or that it was impossible to take such measures. In most air accidents the plane is usually destroyed and the pilot, crew and passengers killed. What survivors there occasionally may be are rarely in a position to supply much useful information as to the cause of the accident or the measures taken to avoid it. In such circumstances the carrier obviously cannot produce sufficient evidence to overcome the treaty-created presumption of liability. In all the court cases which have come to my attention in which death or personal injury claims were involved, the carriers have been held liable, although the treaty limitation has usually applied. It might be added that without the convention, there would be no recovery at all in some countries and very little in others.

In this connection attention should be drawn to the Protocol signed at The Hague on September 29, 1955, amending the Warsaw Convention with respect to the limits of liability. With respect to personal injuries or death, the limit is increased to $16,582, with an added provision that in addition to the prescribed limits, the court may award in accordance with the law of the forum all or part of the court costs and other expenses of litigation incurred by the plaintiff. The Protocol was signed on behalf of the United States, but has not yet been submitted to the Senate for its consent to ratification.

In conclusion, the writer would like to add that insurance to cover flight by regular scheduled commercial lines to England is neither difficult nor expensive to obtain. In fact the rates are amazingly low. The question actually raised in this respect by Mr. Gardner is whether a passenger prefers to take out his own accident insurance and pay for it directly or have the carrier shoulder the cost of such insurance and pass it on to the passenger in the fare rate. In the latter case, should an accident occur causing death or serious injury, the injured person or his executor would bear the added burden of a suit to establish liability.

ELEANOR H. FINCH
Secretary of the Board of Editors
American Journal of International Law

"World Without Barriers" Would Not Be Communist

As the author of *World Without Barriers* and as a member of the Association, I should like the privilege of commenting on the review of my book by Charlton Ogburn in the June issue of the JOURNAL—not to take issue with the personal opinions of the reviewer, but rather to correct an erroneous impression created by the review.

In the statement "The prospect of a socialist world utopia must be thrilling to those who welcome a *world without barriers*", in the words and emphasis of the reviewer, there is the implication that I am a proponent of socialism. The implication is reinforced by the reviewer's references to my "exposition of Communist doctrine and Soviet practice", and my analysis and exploration of the Communist Manifesto, Marxian dialectics,

Communist economic, moral and philosophical concepts—while completely omitting reference to the fact that a substantial portion of my book is devoted to a *refutation* of Communism and Marxism.

Lest my colleagues get a wrong and unfavorable impression of my thinking, I desire to point out that the anti-Communist aspect of the book has been reflected in reviews throughout the country, as well as in the United States Information Agency's recommendation of the book for distribution in foreign countries.

One of my objectives in writing *World Without Barriers* was to point up the technological possibilities of freeing man from present-day restrictive barriers, and thereby upholding the dignity of the individual—in a manner that is utterly impossible under Communism or a planned economy. With that objective in view a goodly portion of the book is devoted to a clarification of the case against Communism—a case which I believe can more convincingly be pleaded by an informed Bar than by any other section of our society.

EMANUEL R. POSNACK
New York, New York

Our London Meeting

(Continued from page 819)

the finest garden party he had ever attended at the Palace. This can hardly be an exaggeration because rarely have so many of Her Majesty's guests shown such enthusiasm—realizing that this was an opportunity to come but once in their lifetime—to be able to walk through the Palace, to stand within a yard or two of the Royal Party and perhaps be presented to Her Majesty or another member of the Royal Family.

For some, a special evening private view of the Summer Exhibition at the Royal Academy provided an enjoyable anti-climax—for all else was of necessity an anti-climax following the Palace garden party. For others, the Bar Musical Society, of which Her Majesty Queen Elizabeth, the Queen Mother, is Patron, entertained with a delightful intimate members' concert in Lincoln's Inn Hall and afterwards with a reception on the surrounding lawns. Amongst the "turns" were performances by members of the American Bar Association, a song by Lord Evershed, Master of the Rolls, and a duet sung on the parking problems in London by Lord Justice Ormerod and Mr. Justice Wynn-Parry.

The final session of the House of Delegates and the 7th and Final Assembly Session were held on Tuesday morning when resolutions of thanks to Her Majesty the Queen, the Lord High Chancellor, the Prime Minister and the English legal profession were unanimously and enthusiastically adopted. Charles S. Rhyne, the incoming President of the American Bar Association, presented David F. Maxwell, the retiring President, with an ivory gavel. Mr. Maxwell spoke of the outstanding success of the London Meeting and said that its six days had done more to cement the friendship between the United States and Great Britain than any single man's efforts could hope to do in a whole year. Sir Reginald Manningham-Buller, in accepting the thanks of the American Bar Association on behalf of the Bar Council and the Law Society staff who had done all the behind-the-scenes organization, said that he had heard by somewhat underhand means, but NOT by telephone tapping, of the presentation of a gavel to Mr. Maxwell, and Sir Reginald having produced a similar one from a box, presented it to Mr. Rhyne.

In an appropriate Inaugural Address, "The Road Ahead", Mr. Rhyne showed a determined intention to carry on the great work of the American Bar Association—especially in the speeding up of bringing cases on for hearing, for he rightly said, "Justice delayed is justice denied".

The success of the Meeting was such that although, perhaps, wearied somewhat by the hectic activities of the past week, members of the American Bar Association seemed sad that their 1957 London Meeting was over. Finally, Sir Reginald Manningham-Buller echoed the feelings of all in Britain when he said that if any song were sought of him in London as it was when he attended the Association's Annual Meeting in Dallas last year, he would sing the old Scottish one, "Will You Ne'er Come Back Again?"

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe • Editor-in-Charge

AIRPLANES: One of the most valuable notes I have read in many a moon appears in the fall, 1956, issue of the *Cornell Law Quarterly* (Vol. 42, No. 1, pages 76-83; address: Ithaca, N. Y.; price $1.50). It is by Melvin H. Osterman, Jr. and concerns *Herman* v. *Northwest Airlines*, 222 F. 2d 326 (2d Cir.), *cert. den.* 350 U. S. 843 (1955). In that case, the ticket of the passenger required that notice in writing must be served within thirty days of an accident and suit be instituted within one year. The Second Circuit upheld the ticket provisions and dismissed plaintiff's suit on the theory that the primary jurisdiction to determine the validity of these ticket time limitations was in the Civil Aeronautics Administration. The note writer concludes the case is in conflict with *Shortley* v. *Northwestern Airlines*, 104 F. Supp. 152 (1952), a decision by the United States District Court for the District of Columbia which has won the approval of District Courts of the United States in Illinois, California, Missouri, Arkansas and North Carolina. This being so, one wonders why the Supreme Court did not grant certiorari. This note reminds one that the airlines are now at the same stage that the railroads once were and that we will see much more of this kind of litigation in days to come. Apparently, the law as to notice of claim against an airline has become as tricky as notifying a city when you fall on a sidewalk. To be safe you ought to file before you fall.

CONSTITUTIONAL LAW: When the Supreme Court decided that racial segregation in the public schools denied equal protection, the question of whether or not the drafters of the Fourteenth Amendment intended to declare that state laws that segregated the races were unconstitutional was tersely disposed of as "inconclusive" of the issue before the Court. In an article recently published in the *Michigan Law Review*, "The Fourteenth Amendment Reconsidered—The Segregation Question" (Vol. 54, No. 8, June, 1956), Alfred H. Kelley, largely responsible for the historical analysis given in the appellant's brief in the school segregation cases, supplies the basis for the Court's treatment of this question. Mr. Kelley's approach is chronological, beginning with a discussion of the early efforts of the radicals to construct a constitutional basis for striking down Jim Crow legislation through a doctrine of national citizenship founded on the comity clause of the Constitution. After discussing the developments that were taking place in the state courts, the author points out that the pre-Civil War efforts of the radical abolitionists were slowly evolving notions of national citizenship, of privileges and immunities inherent in national citizenship, of due process of law, of equal protection of the laws, and of congressional power to enforce these rights. Drawing a comparison with the Fourteenth Amendment, the author sets out the background debates of the Civil Rights Act of 1866 and concludes that it is highly improbable that that Act was meant to ban racial segregation by the states. To support this conclusion the author points out that earlier drafts of the Civil Rights Act failed of adoption because they would have outlawed Jim Crow laws. Having developed this backdrop of history, the author describes in detail the congressional debates that led to the adoption of the Fourteenth Amendment. There emerges, not a consistent pattern of congressional intent, but rather a body of conflicting intentions possessed by the warring factions of the post-Civil War Congress. On the one hand, the conservatives sought to restrict the Amendment to preserve Jim Crow legislation. On the other hand, as seen by the author, the radicals sought to generalize their purposes and evade the issue of the future status of Jim Crow laws in order that they might: first, win the necessary majority vote; second, write an amendment that could be expansively interpreted by the Court to strike down state laws that segregated the races. Pointing out that the original attitude of the Supreme Court coincided with that of the conservatives, the author continues that today the impact of modern social and political thinking has caused the Court to shift to the philosophy of the radicals. Seeing "nothing surprising" in this change in judicial reasoning, the author reasons that stability and continuity in constitutional theory will come from a dynamic not a static theory. Extensively documented, this study seems to provide the reasoning that the Court omitted when it found that the history of the Fourteenth Amendment was inconclusive. (Reprints may be obtained by writing the Michigan Law Review, Hutchins Hall, Ann Arbor, Michigan. Price: fifty cents per reprint).

DEPOSITIONS: Warren J. Abbott in the December *U.C.L.A. Law Review* (Vol. 4, No. 1, pages 150-154; price: $1.50 per single issue; address: University of California at Los An-

geles, Calif.) notes the interesting decision of the Second Circuit Court of Appeals in *Richmond* v. *Brooks,* 227 F. 2d 493. There it seems the plaintiff was a native of California. She brought suit for an unpaid loan in the state court of New York and defendant removed to the federal court. Instead of appearing at the trial, plaintiff gave his testimony by deposition on written interrogatories. It was the only proof he offered. The trial judge dismissed but the Second Circuit reverses. Mr. Abbott has a very valuable discussion of the problem presented.

DOMESTIC RELATIONS: The annual symposium issue of the *Vanderbilt Law Review* in 1956 was devoted to domestic relations (June, 1956, Vol. 9, No. 4; price: $2.00; address: Nashville 5, Tennessee). There are articles on infant marriages by Dean Robert Kingsley of University of Southern California Law School, conflict of laws by Dean Charles W. Taintor II, of Pittsburgh Law School; marriage stability by Professor Max Rheinstein, the University of Chicago Law School; family welfare by Professor John B. Bradway, of Duke Law School; divorce by Professor William E. McCurdy, of Harvard Law School; support by Professor Monrad G. Paulsen, of Minnesota Law School; adoption by Professor Leo Albert Huard, of Georgetown Law School; a model family will by Professor William J. Bowe, of Vanderbilt Law School; family bankruptcy by Professor G. Stanley Joslin, of Emery Law School; family tort responsibility by William J. Harbison, of Vanderbilt Law School; and personal torts within the family by Val Sanford, both Messrs. Harbison and Sanford being lecturers in law at Vanderbilt. Annually this Vanderbilt symposium is of high quality and this year's product appears to be up to the high standards of the past.

LIBEL: Professor Robert A. Leflar, who is leaving New York University Law School to become Distinguished Professor at Arkansas Law School, writes another excellent piece in the Spring, 1956, *Arkansas Law Review* (Vol. 10, No. 2, pages 155-178) entitled "Legal Liability for the Exercise of Free Speech". Libel lawyers and civil liberty lawyers will want it. (Address: Fayetteville, Arkansas, and send $1.00).

MILITARY JUSTICE: There were some breath-taking developments on the military justice front in the 84th Congress, Second Session, 1956, that lawyers everywhere with military clients should know about.

The *Congressional Record* of July 26, 1956, tells the story of the confirmation of Chester Ward as an admiral and the new Judge Advocate General of the Navy. The naming of Chester Ward by President Eisenhower and his confirmation by the Senate and its special committee headed by Senator Lister Hill, of Alabama, is a salutary thing as Admiral Ward is so highly regarded by lawyers everywhere.

The new Social Security Act of 1956 (Public Law 880 of the 84th Congress Chapter 836, Second Session H.R. 7225) will subject the military to social security contributions for the first time. Before this they were given a gratuitous credit while on active duty.

Another bill passed by the 84th Congress (Public Law 770, Chapter 682, Second Session, H.R. 9246) provides for payment of accrued leave owing to men on active duty in 1946.

Still another bill (Public Law 777, H.R. 7646, 84th Congress, Second Session) provides for the payment of "counsel fees, bail and other expenses" for those American servicemen haled before the courts of foreign countries under the Status of Forces agreements.

On August 17, 1956, the Court of Military Appeals in *United States v. Johnnie L. Brown,* No. 7998, decided it was reversible error to close a court martial to the public even though in so doing the convening authority agreed that if the accused wished any particular person to attend, his presence could be arranged for. The opinion of COMA is by Judge George W. Latimer, and it lays emphasis on the point that the ruling excluded newspaper reporters. To the extent at least of newspaper men, the decision follows the ruling of the New York Court of Appeals in the case of Mickey Jelke (*New York* v. *Jelke,* 308 N.Y. 56, 123 N.E. 2d 769).

This decison of COMA is discussed in a mighty fine piece by Zeigel W. Neff, one of the Court's Commissioners in the *Judge Advocate's Journal* for November, 1956. (For a copy write the Superintendent of Documents at the Government Printing Office, Washington 25, D. C., and send either 15 cents for one copy or $1.25 for a year's subscription.)

Commissioner Neff traces the right to public trial far back into Anglo-American law. He even discusses Star Chamber and the French *lettres de cachet* long before the Bill of Rights in the Sixth Amendment provided for a speedy, public trial and confrontation of witnesses before an impartial jury where the crime was committed. It is an invaluable contribution.

Along with Commissioner Neff's study for those hardy souls who can stand it, your editor immodestly suggests a reading of "JAG Justice in Korea" in *The Catholic University Law Review for January,* 1956 (Vol. 6, No. 1, 1323 18th Street, N.W. Washington 6, D. C., single issue $2.00) which discusses the fact that the records of courts-martial cases are kept secret and are not open to public inspection like court records.

However, as its title indicates, the secrecy of the records in courts martial cases is but one phase considered. There is a general discussion of the reforms that our Association sought in the Code of Military Justice and failed to achieve, followed by a detailed analysis of the bill introduced into the 84th Congress

(Senate 2133) to amend the Code of Military Justice. That bill lacked not only the approval of our Association but also the Second Hoover Commission, the Coast Guard, the Court of Military Appeals and the Court's Special Committee headed by Whitney North Seymour, of New York, New York. Volume 6, No. 1 of the *Catholic University Review* is entirely devoted to courts martial.

On September 7, 1956, the Court of Military Appeals affirmed the conviction of Batchelor for collaborating with the Chinese Communists while a prisoner of war in violation of Article 104 of the Uniform Code of Military Justice. This follows a similar decision by the Court in *United States* v. *Dickenson*, 6 U.S.C.M.A. 438 (1955), and a decision by the United States District Court of the District of Columbia in the case of Major Alley (C.A. 3647 D.D.C. August 31, 1955, and C.M. 387487, 1955). On September 7, 1956, a Navy Board of Review affirmed Alley's court-martial conviction. Meanwhile Alley's civil case has been appealed to the District of Columbia Circuit where it awaits argument and decision (Docket No. 12949).

MILITARY JUSTICE: Professor R. R. Baxter of Harvard Law School writes this department asking that we draw to the attention of the profession certain other articles with respect to the Status of Forces Agreement in addition to those listed in the February, 1957, issue of the JOURNAL. He writes:

> Since you had gone to so much trouble in drawing together the materials, I thought I might venture to call several more articles to your attention. It seems to me that everything which has been written in this country on the immunities of visiting forces under customary international law owes a great deal to two articles by a New Zealander, George Barton, in the British Year Book of International Law. These are Foreign Armed Forces: Immunity from Criminal Jurisdiction, 27 Brit. Y.B. Int'l L. 186 (1950) and Foreign Armed Forces; Immunity from Supervisory Jurisdiction, 26 Brit. Y.B. Int'l L. 380 (1949). He really did a fine job in pulling together the cases, treaties, and laws on the subject, so that when the NATO Status of Forces Agreement came before the Senate, Mr. Schwartz who wrote the memorandum for the Attorney General on the subject, had a large part of his work already done for him. I think we should also not leave out our own Colonel Archibald King who wrote two fine, but now out-dated, articles in the American Journal of International Law in 1942 and 1946. Barton has, by the way, done a further study of the NATO Status of Forces Agreement under the title "Foreign Armed Forces: Qualified Jurisdictional Immunity" in 31 Brit. Y.B. Int'l L. 341 (1954).
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> While I am rattling on about this subject, I might add that the Harvard Law Review will in its next issue or so have a note on the operation of the NATO Status of Forces, that Father Snee of Georgetown is planning an article on the subject, and that an article by Colonel Schuck of the Army will also be appearing shortly in the Columbia Law Review. The field seems extremely active.

I am very grateful to Professor Baxter and can only add that I have read with a good deal of interest the study Father Snee recently completed of Status of Forces cases for the Defense Department.

PROXY FIGHT EXPENSES: Joseph E. Lynch in the summer, 1956, issue of the *Cornell Law Quarterly* (Vol. 41, No. 4, at pages 714-722; price: $1.50; address Cornell Law School, Ithaca, New York) writes interestingly with respect to the well-known case of *Rosenfeld* v. *Fairchild Engine and Airplane Corporation*, 309 New York 168, 128 N.E. 2d 291. The total expenses of the proxy fight in the *Fairchild Airplane Corporation* case was $261,522. The defeated management group spent $133,966 which they charged to the corporate treasury. The successful insurgents spent $127,556 which, upon taking office with stockholders approval, they also charged to the corporate treasury. The plaintiff Rosenfeld brought a minority stockholders' suit against the Fairchild Corporation and its directors to recover the corporate funds. The Court of Appeals of the State of New York split three ways. The majority opinion of the court of Judge Froessel, in which Chief Judge Conway and Judge Burke concurred, approved the payment. In a special concurring opinion in which he expressed differences from the majority opinion, Judge Desmond concurred in the result of the case. The dissenting opinion was written by Judge Van Voorhis and in that opinion Judges Dye and Fuld concurred. The note of Mr. Lynch is extremely valuable in analyzing the reasons given in the three opinions. He considers, for instance, the effect of having stockholders' approval and the effect of not having stockholders' approval. He also deals with a very important problem of burden of proof. One of the points apparently in Judge Desmond's concurring opinion places the burden of proof upon the complaining stockholder. Another interesting facet of the case is this question whether a stockholder such as Wolfson in Montgomery Ward, who fails but spends $1,200,000, may recover on the theory that he has conferred a benefit on the corporation by electing himself as a director by virtue of having knocked out the classification of directors and brought about cumulative voting. Apparently this point has yet to be tested. There is discussion of the New York Central proxy contest where the insurgents spent $1,308,733.71 which they charged to the corporate treasury. The note writer does not tell us how much the management group in New York Central spent in that famous fight but presumably they spent an equal amount and presumably it also was paid from the corporate treasury. If past experiences be any guide to the future, American corporations will doubtless see more proxy fights in the future. There do not seem to be many cases in which the right of insurgents to collect their expenses

been questioned. Nevertheless, Mr. Lynch's article is a very valuable discussion in a very difficult and important field.

REHEARINGS: My good friend, Chief Judge Charles Clark has called for a rehearing of the following statement that appeared in this column in our July, 1957, issue (43 A.B.A.J. 659):

> The Watkins case on the 1956-1957 Supreme Court Docket (#261) is a recent example of a case where the District of Columbia Circuit sitting *en banc* reversed one of its panels. Curiously, the Second Circuit Court of appeals has "never convened *en banc* for any purpose" even though the Supreme Court in *Western Pacific Railroad Corp.* v. *Western Pacific R.R. Co.*, 345 U.S. 261, in leaving to each circuit discretion how to exercise the *en banc* privilege said "that so necessary and useful a power could not be ignored".

In this request the good Judge is joined by Donald F. X. Finn, the alert law clerk to Federal Judge Sylvester Ryan in the Southern District of New York.

As we know, the *Watkins* case was reversed by the Supreme Court of the United States on June 17, 1957, and thereby the D. C. panel of opinion of Chief Judge Edgerton became the law of the land (*Watkins* v. *U.S.*, 77 S. Ct. 1173) but Chief Judge Clark and Donald F. X. Finn point out that the Second Circuit sat *en banc* in 1956 in the *Lake Tankers* case (2d Cir., 235 F. 2d 783), decided in August, 1956, and in the *Schaffer Brewing* case (2d Cir., 236 F. 2d 889) decided in September, 1956. Both Clark and Finn also report that in April, 1957, the Second Circuit sat *en banc* in two cases in which at this writing no decisions have as yet been rendered.

My statement was made in reliance on the excellent article, "Rehearings in American Appellate Courts", by Professor Ronan E. Degnan of Utah Law School and Professor David W. Louisell of the University of California Law School, which appeared in the October, 1956, issue of the *Canadian Bar Review* (Vol. 34, No. 8, pages 898-938; price not stated; address: The Editor, G. V. V. Nicholls, Q.C. at 1390 Sherbrooke St., W., Montreal 25, Quebec, Canada.) For authority for their statement (the Second Circuit "never convened en banc for any *reason*") in footnote 106, Degnan and Louisell cite: "See Maris, Hearing and Rehearing Cases in Banc (1953) 14 F.R.D. 91; Comment (1953) 5 *Stan. L. Rev.* 332".

A check with the authors reveals that Chief Judge Clark and Donald F. X. Finn are right and Professors Degnan and Louisell are right and I am right and we were all as right could be as of the time in 1956 when their article went into type for publication in October, 1956. In between the time Degnan and Louisell wrote and their article was published, the Second Circuit hit the sawdust trail and decided that henceforth it would sit *en banc* in appropriate cases. Of course, if Degnan were not in Salt Lake City and Louisell in Berkeley and I in Foggy Bottom, we all three would have heard of the change in the Second Circuit's *en banc* practice either when the Judges all sat down together in early 1956 or when their decisions were announced in August and September, 1956. I fear this is a price those of us who live in the hinterland must pay.

I am very indebted to both Judge Clark and Mr. Finn, first for reading this column and second for passing on this important news. At its 1956 Term, the Supreme Court refused to permit the Eighth Circuit to certify a question when there existed a conflict between panels of its own court (*Theodore Wisniewski* v. *U. S.*, 353 U. S. —, 1 L. ed. 2d 658, 77 S. Ct. 633, where the Court *per curiam* said, "It is primarily the task of a Court of Appeals to reconcile its internal differences", and "doubt about the respect to be accorded to a previous decision of a different panel should not be the occasion for invoking so exceptional a jurisdiction of this Court as that on certification".)

This is another indication that *en banc* practice in the Circuits can become even more important. Does this mean before you apply for certiorari and there is a conflict in panels you ought to ask your Circuit to sit *en banc*? How far are we going to carry this *en banc* business?

But the worst mistake in that July, 1957, column on "Rehearings" (43 A.B.A.J. 659) was not my failure to know that the Second Circuit sometimes now sits *en banc*. It was the *false* statement that Mr. Justice Brennan voted for a rehearing in the *Covert* and *Krueger* cases (77 S. Ct. 1222, *sub nominee Kinsella* v. *Krueger* and *Reid* v. *Covert*). The Supreme Court in June, 1956, at its October, 1955, Term decided that Mrs. Covert (who split her husband with an axe in England) and Mrs. Smith (daughter of General Walter Krueger, who shot hers in Japan) could be court-martialed (351 U.S. 470 and 487, 100 L. ed. 1342 and 1352, 76 S. Ct. 886 and 880) even though they were civilians ordinarily entitled to be tried in a federal district court under Article III of the Constitution (*United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 100 L. ed. 8, 76 S. Ct. 1). Mr. Justice Minton participated in the June, 1956, decision in *Covert* and *Krueger* and the motion of Frederick Bernays Wiener, counsel for the defendants, was made in the fall of 1956 at the opening of the Court's October, 1956, Term. Since he did not sit when the cases were argued and decided at the October, 1955, Term, of course, Mr. Justice Brennan could not and whether he could, would not and did not sit on the motion for the rehearing which was granted (352 U. S. 901, 1 L. ed. 2d 92, 77 S. Ct. 123).

To win his rehearing Mr. Wiener had to change the mind of one Judge. That one was Mr. Justice Harlan who voted with the Chief Justice and Justices Black, Douglas and Frankfurter for a rehearing. At the October, 1955, Term in June, 1956, Warren, Black and Douglas had dissented and Frankfurter had "reserved" his opinion. All four complained then of lack of time to write

their views.

The correct guide to whether a Supreme Court Justice participates in a case is not the "order" published on Decision Day but the Court's "Journal". I made the colossal blunder of relying on the "order" instead of checking the "Journal". It has been most embarrassing and I confess my error so others will not make my mistake.

Of course, once rehearing was granted, Mr. Justice Brennan was obliged to sit and he heard the reargument and participated in the decision. Along with the Chief Justice and Mr. Justice Douglas, he joined in the opinion of Mr. Justice Black reversing the convictions of Mrs. Covert and Mrs. Smith. Both Mr. Justice Frankfurter and Mr. Justice Harlan concurred in the result but each wrote separate opinions. Mr. Justice Clark wrote in dissent adhering to his June, 1956, opinion that the convictions should be affirmed and in his opinion Mr. Justice Burton concurred. Justices Reed and Minton who had joined Clark and Burton in June, 1956, had gone by June, 1957. Mr. Justice Whittaker had not taken his seat when the Solicitor General and Mr. Wiener reargued the cases.

The concurrence of Frankfurter and Harlan is limited to the peculiar facts of the *Covert* and *Krueger* cases. Can civilians other than spouses be court-martialed? Can even spouses and all other civilians be court-martialed for non-capital offenses? The failure of Frankfurter and Harlan to pass on these points leaves the matter up in the air as the Black opinion carries only four votes. The Court of Military Appeals before the *Covert* and *Krueger* decision decided that civilian employees could be court-martialed (*United States* v. *Burney*, 6 U. S. C. M.A. 776, 21 C. M. R. 98) and it is now faced in a pending appeal (*United States* v. *G. S.-11 Bruce Wilson*, Board of Review No. C. M. 392423, Docket No. 9638) with the question whether *Covert* and *Krueger* overrule its *Burney* decision.

My humblest apologies to Mr. Justice Brennan for my grossly incorrect statement. Chief Judge Clark cannot hold me in contempt for the *en banc* remark as Degnan and Louisell are my alibi witnesses, but in Brennan's case, guilty I am and I throw myself on the mercy of the Court.

[Editor's Note: In fairness to Mr. Keeffe, we want the record to show that he caught the misstatement about Mr. Justice Brennan in galley proof. Unfortunately, the item was crowded out of the June issue, and his correction was not picked up when the item was published in July. Our apologies to both Mr. Keeffe and Mr. Justice Brennan.]

TRADEMARKS. "A Display Theory of Trademarks", by Lewis Garner, practicing lawyer of the Chicago Bar, theorizes that whether a secondary meaning mark has acquired secondary meaning, thus giving rise to a cause of action for its improper simulation, depends primarily on its physical context, and not necessarily on long or extensive use. The same theory is proposed to determine whether the second user is using the symbol in a language sense (which is privileged) or a trademark sense (which is non-privileged). Valuable reading for those concerned with misuse of a secondary meaning mark. *The George Washington Law Review*, Vol. 25, No. 1, October 1956: address: The George Washington University Law Review, Washington 6, D.C. Single copy price: $1.00).

Drumhead Justice Is Dead!

(Continued from page 800)

through Judge Latimer, in the case of *United States* v. *Clay*, *supra*, has stated:

> A cursory inspection of the Uniform Code of Military Justice, supra, discloses that Congress granted to an accused the following rights which parallel those accorded to defendants in civilian courts; to be informed of the charge against him; to be confronted by witnesses testifying against him; to cross-examine witnesses for the government; to challenge members of the court for cause or peremptorily; to have a specified number of members compose general and special courts-martial; to be represented by counsel; not to be compelled to incriminate himself; to have involuntary confessions excluded from consideration; to have the court instructed on the elements of the offense, the presumption of innocence, and the burden of proof; to be found guilty of an offense only when a designated number of members concur in a finding to that effect; to be sentenced only when a certain number of members vote in the affirmative; and to have an appellate review.

The court further states that this list is not all-inclusive, but that those mentioned are of such importance as to be readily catalogued as substantial. I suggest that the recommendations complained of be examined to determine their effect upon these rights.

Mr. Walsh as his first point discusses the possible effect, in his opinion, of recommendations proposed by The Judge Advocates General of the Air Force and the Navy for a change to Article 31 dealing with the right against self-incrimination.[17] He concludes that this recommendation would open the door to the use of coercion by an accused's commander, who, according to his interpretation of the effect of such a change, would not be conducting an official military investigation.

17. Mr. Walsh: "One of the most important changes asked by the Navy and Air Force deals with the right against self-incrimination. Under the present law, no member of the military establishment, regardless of rank or assignment may question a suspect 'without first informing him of the nature of the accusation and advising him that he does not have to make any statement.' . . .The Navy and Air Force want this restriction to apply only to persons who serve with a 'military law enforcement or military crime detection agency' or who are otherwise conducting 'an official military investigation' ".

Although Article 31 (b), Uniform Code of Military Justice, provides: *"No person subject to this Code* shall interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement . . ." (emphasis supplied), its scope has already been limited by decisions of the United States Court of Military Appeals and Boards of Review. ". . . the application of the present provisions demands some element of officiality".[18]

Consequently, the statement by Mr. Walsh that, under the present law, *no member of the military service, regardless of rank or assignment,* may question a suspect without first informing him as required, is incorrect. The application of the Article is limited to those who have some official connection with the case. The proposed amendment is an attempt to codify existing case law.[19]

Touching on the conclusion reached by Mr. Walsh that, under the proposed amendment, a commander will be able to question a member of his command concerning a suspected offense without the necessity of warning as required by Article 31, it is apparent that under the requirements of Par. 32b, *Manual for Courts-Martial, 1951* (which requires an immediate investigation by the commander upon receipt of sworn charges), such interrogation by a commander falls squarely within the language of the proposed amendment, "who are otherwise conducting an official military investigation", and a failure to warn will preclude the use of any matter disclosed at a subsequent trial.

The Judge Advocates General of the Army and Navy have proposed that the words "thorough and impartial" be stricken from the context of Article 32, Uniform Code of Military Justice. To this Mr. Walsh objects. Article 32 reads in part as follows:

> No charge or specification shall be referred to a general court-martial for trial until a *thorough and impartial* investigation of all the matters set forth therein has been made. This investigation shall include inquiries as to the truth of the matter set forth in the charges, and the disposition which should be made of the case in the interest of justice and discipline. [Italics supplied.]

The wisdom of such a proposal is certainly open to question, particularly in view of the commendable habit of the American people to object to any action which may possibly, under any interpretation, affect their right to fair treatment. This attitude, of course, explains Mr. Walsh's search for a credible reason for such a proposal which he presents as follows: "The only credible reason for removing this phrase is that the Army and Navy do not desire to give the accused a full and fair investigation." Fiddlesticks! There is no credible reason other than an attempt to eliminate surplusage and the authority to conduct a less formal and time-consuming investigation, an investigation which in itself is supplemental to that conducted by the immediate commander of the accused and referred to previously. Compare the formal pretrial investigation required by Article 32 with the examining trial or preliminary hearing in most of our states or the commissioner's hearing authorized by Rule 5, Federal Rules of Criminal Procedure. Consider also the mandate of Congress contained in Article 23 (d), which states: "The requirements of this article shall be binding on all persons administering this Code, but failure to follow them in any case shall not constitute jurisdictional error." Error created by a failure to follow the pretrial investigation requirements must in any case be assessed on its merits to determine whether or not an accused's substantial rights have been prejudiced by such failure.

Assuming, therefore, that these words were removed, how can any appellate court deny that Article 32 as amended would still require a full and complete investigation, and that impartiality would continue to be paramount? Basic rights of the individual would not be infringed upon by a less formal investigation.

The Judge Advocate General of the Navy has recommended that an accused be accorded the right to waive the pretrial investigation.[20] Mr. Walsh objects to this proposal.

Notice, however, the wording of the proposed amendment: "(e) For offenses in violation of Article 85 through 92[21] the accused may, *after consultation with counsel,* waive the investigation required by this article" (italics added). This is neither unreasonable nor an indication of an attempt to return to the old system.

The legal departments of the Army and Navy consider the pretrial investigation as the equivalent of the examining trial or the commissioners' hearing. On the other hand, the Air Force considers it the military equivalent of the grand jury, as mentioned previously, and consequently did not enter into this proposal.

I know of no state law which prohibits waiver of examining trial. Also, an examination of Rule 5c, Federal Rules of Criminal Procedure, indicates that exercise of the right to waive is anticipated. Indeed, on many occasions, I, and I am sure many of the readers, have exercised this right as a proper defense tactic designed to prevent premature disclosure of defense evidence, theory,

18. *United States* v. *Josey,* 3 USCMA 767, 14 CMR 185; *United States* v. *Wilson and Harvey, supra.*

United States Court of Military Appeals and Boards of Review have also interpreted this requirement, an extension of the Fifth Amendment in its application to military personnel, as being inapplicable in the case of a civilian police officer obtaining a statement from a military person. (ACM S-5748, *Cocuzza,* 10 CMR 753, *United States* v. *Wilson and Harvey, supra*).

19. *United States* v. *Bound,* 1 USCMA 224, 2 CMR 130; par. 64, MCM, 1951.

20. Mr. Walsh: "The Navy, wisely anticipating that some persons might not desire to throw themselves upon the prosecutor's mercy, has also suggested that the law make it possible for the accused to waive the whole investigation if he is suspected of a purely military offense such as desertion or disobedience."

21. Article 85 - Disobedience.
Article 86 - Absence without leave.
Article 87 - Missing movement.
Article 88 - Contempt toward officials.
Article 89 - Disrespect toward superior officers.
Article 90 - Assaulting or willfully disobeying an officer.
Article 91 - Insubordinate conduct toward a non-commissioned officer.
Article 92 - Failure to obey orders or regulations.

or technique during a preliminary hearing. Why should such a waiver be banned in military law, assuming that the preliminary hearing concept of the pretrial investigation is correct? The recommended amendment specifically states that the investigation shall not be waived except on advice of counsel. I fail to see how adoption of this amendment can reduce in any manner the individual rights granted an accused by the Congress.

The recommendation that a judicial appeals board be established in the office of each of the three Judge Advocates General to pass upon the merit of petitions for review to the Court of Military Appeals appears to be objectionable to Mr. Walsh. Admittedly, such a recommendation without a study of the basis therefor would seem to be imposing a barrier within the military legal system to the right of appeal to a civilian court.[22] Let us examine, however, the reasoning which gave birth to this recommendation. A study of the Uniform Code clearly shows that no limitations exist on the right of an accused to petition the United States Court of Military Appeals, other than time (Article 67c, UCMJ). Many petitions for review are filed by accused who at trial level have entered guilty pleas and presented no evidence in their own behalf. To quote from the Annual Report of the United States Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury for the period January 1, 1954, to December 31, 1954:

> Three and one-half years' experience under the Uniform Code has clearly indicated that the unlimited authority of an accused to petition the United States Court of Military Appeals for a grant of review under Article 67(b) (3) has resulted in numerous frivolous appeals being made to the court with attendant excessive costs in time, money and manpower as a result thereof. . . .

From the figures furnished by the United States Court of Military Appeals in the last annual report, we find that as of December 31, 1953, 3488 of 4092 petitions forwarded to the court were denied, or stated percentage-wise, 85 per cent of the petitions for grant of review which were presented to the court were denied.

> In the Air Force, during the past year [January 1, 1954—December, 1954] the accused petitioned the court for a grant of review in 431 cases and such petitions were denied, indicating no justiciable issue was found to exist, in 386 cases or 90% of those petitioned (thirteen petitions granted, 6 petitions withdrawn and action pending on 26 petitions).

Further, to indicate that the recommending authorities were not entirely unaware of the interest of the accused as suggested by Mr. Walsh, the following quotation from the same publication is of interest:

> Procedure before the Judicial Appeals Board should be in accordance with uniform rules established by The Judge Advocates General which may provide for determination by such boards on the pleadings. The Judicial Appeals Board which considers the case shall, *if all three members agree* that the accused has not shown good cause for appeal from the decision of the Board of Review, deny the petition. However, if the Judicial Appeals Board does not unanimously agree that the petition should be denied, The Judge Advocate General shall issue a Certificate of Good Cause Shown and forward the record of trial, the pleadings, the findings of the Judicial Appeals Board, and the certificate, to the United States Court of Military Appeals for its consideration and decision as to whether the petition for grant of review should be granted [Italics added].

From reading the cited statistics it becomes evident that such frivolous appeals must be reduced, particularly when steps can be taken by means of changes in law and procedure to reduce the load without violation of an accused's rights. It does not follow that the legal departments of the military services, if granted authority to establish judicial review boards, will operate such boards in a manner derogatory to an accused's rights. That presently the rights of the individual accused are of primary consideration to the legal departments of the services is well established by the fact that only in .3 per cent of the total number of cases reviewed by Air Force Boards of Review were petitions granted by the United States Court of Military Appeals.

Mr. Walsh mentions the fact that the function of the law officer is a part-time assignment. At this point he ceases his attack upon the recommendations of The Judge Advocates General and again concentrates upon either substantive faults in the Uniform Code or the failure of the service legal departments to properly carry out its provisions.

The Law Officer . . . *An Independent Judge*

In regard to the position of the Law Officer in the administration of military justice, there are many who would recommend that the duty be assigned *permanently*. On the other hand, there are those who seriously feel that the Law Officer can be more effective if returned to his previous status as a member of the court. Under the present system, regardless of statements to the contrary, the Law Officer is subject to little, if any, control by higher authority, other than decisions of the Boards of Review and the Court of Military Appeals. There are instances without doubt in which the Law Officer has deferred to the wishes of superior command authority, but they are few in number, and if evidence of such deference is evident from the record, or even outside of the record, the Boards of Review and the United States Court of Military Appeals are quick to take corrective action. Further, I fail to understand the alleged harmful effect of any awareness on the part of the Law Officer that his superiors have already approved the prosecution's case. Knowledge of this fact could not influence him in his rulings and decisions when he knows that such rulings and decisions are subject to review by appellate courts. Remember that his professional integrity is also at stake.

22. The United States Court of Military Appeals is composed of three civilian judges —Article 67 UCMJ.

An interesting case in point is *United States* v. *Blankenship*, 7 USCMA 328, 22 CMR 118.

The military lawyer, when he dons uniform, does not, contrary to popular belief, subjugate his legal professional status to his military status. He remains a lawyer and subject to his professional code of ethics. His interest in military justice is by its very nature an interest in the field of law, and he is concerned with improvement. Every military lawyer is aware of the fact that improper command influence is an evil and will adopt every course within his capability to eradicate it.

No good purpose can be served by an extended discussion of some of the recommendations which Mr. Walsh failed to mention. For instance, consider the recommendation of a one-officer court upon request of the accused, which is identical to the right to waive trial by jury granted by Rule 23 (a), Federal Rules of Criminal Procedure, the constitutionality of which has been upheld many times.[23] Consider also the recommendation that where no punitive discharge is adjudged by a general court martial, a summarized record of trial may be made in lieu of a verbatim record, a procedure presently authorized for special courts martial in such cases; the recommendation for reduction of the time limit within which notice of intent to appeal must be transmitted, representing an attempt to bring the procedure more in line with federal appellate procedure.[24]

I should like to quote from a report by Major General Reginald C. Harmon delivered to the Judge Advocates Association, in Dallas, Texas, August 29, 1956.[25] This discussion represents the attitude of The Judge Advocate General of the Air Force toward the protection of individual rights and human concepts of justice.

> . . . During the five year period as well as during Fiscal Year 1956, convening authorities have reduced confinement in between 13 and 14% of the cases and have suspended the execution of punitive discharges in between 23 and 24% of the cases. Further clemency has been extended by Boards of Review by modifications for legal reasons and reduction in sentences for appropriateness as well as reductions in confinement and suspension of discharges by the Judge Advocate General and the recommendations to the Secretary for the substitution of administrative discharges in lieu of punitive discharges. As you know, since the beginning, we in the Air Force have felt very strongly that our responsibility did not end with the conviction and punishment of offenders but extended to and included every effort within our power to reform and rehabilitate those offenders wherever possible. In addition to the conservation of manpower, we have always felt that society would be best served by making good airmen out of bad ones in order that they may return to their respective homes at the conclusion of their service with an honorable separation rather than a dishonorable one with the accompanying stigma and disgrace which may make them burdens on society rather than useful citizens in future years.
>
> I have also felt that The Judge Advocate General not only had clemency powers but a very serious clemency responsibility, and in order to be in a position to properly discharge that responsibility, we established several years ago that very important part of our procedure in the administration of justice known as the post-trial investigation. In each case the staff judge advocate conducts a thorough investigation after the trial, including a conference with the accused, his commanding officer, the chaplain of his faith, the prison officer, the psychiatrist and any others who may possess relevant information on the questions of why did the accused commit the offense and does he possess the qualities which will make him a suitable candidate for clemency or rehabilitation.
>
> In addition to all of the other types of clemency and efforts at rehabilitation, which are exercised within the various units of the Air Force itself, in 1952 we established the Retraining Group at Amarillo in a further effort in making good airmen and good citizens out of bad ones. Approximately 3100 prisoners have been processed through that Retraining Group. Of that number, 65% have been returned to the Air Force and further military service. Of this 65%, approximately 71% are presently either on a productive duty status or have earned a subsequent honorable separation from the Air Force on the expiration of their term of enlistment. This means that 3100 people who were too bad to rehabilitate within the units themselves but still had enough good in them to give some hope of rehabilitation, have been retrained at Amarillo and nearly half of them are good citizens today either in the Air Force or out of it. I submit that the effort has been worth while.
>
> Since the war, much consideration has been given in protecting the rights of the accused before the trial, at the trial and during the appellate process. Certainly, every member of our profession will always enthusiastically approve every effort to see that every accused is clothed with all of the safeguards of protection afforded by our Constitution and long recognized and cherished by our people. However, in affording that protection, I think that we always have to remember that there is another party to the proceedings, to wit, the people. We should never become so blinded by our diligence to protect the rights of the man charged with crime that we do not recognize the harm to society resulting from his violations . . . in the administration of the criminal law, both in the service and out of it, in addition to seeing that all of the rights of the accused are completely protected, the guilty must be punished in order that the law abiding citizens of our land may be protected from the lawless.

These statements, reflecting the policy of the Air Force legal department since its beginning, certainly do not indicate a desire to remove from an accused the cloak of protective rights endowed by Congress.

With this writing, I do not mean to indicate that I am personally at war with Mr. Walsh. My quarrel is with the prevailing damaging attitude that any change in military justice, substantive or procedural, when recommended by the military service becomes automatically an attempt to return to the "old system". Recommendations for change in our civilian system of criminal jurisprudence, though many times debated hotly, are at least accepted with the full knowledge that the author of

23. *Patton* v. *U.S.*, 281 U.S. 276, 50 S. Ct. 253, 74 L. ed. 854; *Adams* v. *U.S.* ex rel. *McCann*, 317 U.S. 269, 63 S. Ct. 236, 87 L. ed. 268.

24. Rule 37(a), Federal Rules of Criminal Procedure.

25. The Judge Advocate Journal, October, 1956.

such recommendations does not by that means advocate a return to criminal justice as it existed in the year 1600. Why are not changes advocated by the military in regard to the administration of military justice accepted in the same light?

The Uniform Code of Military Justice will continue to be the subject of discussion for years to come. This is only fitting, since it represents a system of justice much greater in scope than that administered by civilian federal courts. It must also be admitted that the Code is here to stay and we must live with it. That this fact has been accepted by The Judge Advocates General is thoroughly evidenced by their administration, opinions of the Boards of Review, and decisions of the Court of Military Appeals. When attorneys, civilian and military, cease to argue its merits and to search for means of improvement, then the system begins to deteriorate. The recommendations of The Judge Advocates General to the Congress do not evidence a desire to return to "drumhead justice"; rather they are indicative of a desire to make the administration of military justice less cumbersome, expensive and time consuming, yet maintain the integrity of basic human rights enumerated by the Constitution, and the adtional rights granted by Congress.

DRUMHEAD JUSTICE IS BURIED! LET'S LET IT LIE!

The Economics of the Profession

(Continued from page 792)

47.1 per cent, while the lowest segment shows the largest relative increase from 4.1 per cent in 1950 to 4.6 per cent in 1954. This slight movement toward equality is comparable to similar income movements among the nation's families.

The greatest increases in income from 1947 to 1954 occurred in the lowest groups. Whereas the average net income for all lawyers rose from $7530 in 1947 to $10,220 in 1954, an increase of 36 per cent, an average lawyer 30 years of age in 1947 experienced an increase of 114 per cent by 1954. Increases substantially larger than average are noted for all the selected age levels with the exception of those lawyers aged 50 in 1947 who reported the average increase for 1954.

B. *Income Data*

The average net income of all lawyers engaged in all forms of legal practice in 1954 was $10,220, or 36 per cent higher than the $7530 average in 1947. The median net income of all lawyers was $7,833, or 37 per cent above the 1947 median of $5,700 (*i.e.*, half the lawyers received more than this amount and half received less).[10]

As a group, the all-salaried group[11] of lawyers had the highest average per lawyer with $10,380, and with a median average of $8442. The major independent lawyer who depends solely on independent practice is not far behind with a mean average of $10,294 but with a median average of only $7,554.

The income of lawyers shows a wide dispersion. Whereas some lawyers make less than $1,000 per year from legal work, a slightly smaller number of lawyers net between $25,000 and $30,000 per year from law practice. Less than one per cent of all lawyers earn a net income in excess of $50,000 a year. Furthermore, there is a basic difference between the independent and salaried groups, for in the independent group one third received net income below $5,000 and one fifth over $15,000; in the salaried, only 12 per cent were classified below the $5,000 level and 15 per cent earned over $15,000. Thus the salaried group has fewer lawyers at the income extremes. At the same time 20 per cent of all lawyers who earn the most money in the legal field account for nearly half of the total net income of the entire legal profession. The underlying dispersion among lawyers is not unlike distributions of persons in some other independent business and professional groups.

Lawyers' incomes are affected by many factors. Earlier studies have proved that broad economic factors are more important in their relationship to the number and incomes of lawyers than the old familiar ratios of lawyers to population or the wealth per capita figures of the various states.[12] In general, the demand for lawyers and their services as well as their incomes is directly related to the economic activity in the state. At the same time, new studies show that the incomes of lawyers are directly related to the nature of clientele, sources of income, size of law firm, size of community, location, age and years of practice and type of practice.[13]

(a) *Clientele*

In 1954, individuals and business clients contributed almost equally to the gross income of lawyers. As incomes increase, however, lawyers are less dependent on individuals and more dependent on the business community. The lowest levels of gross income, in contrast, show a very high dependence on individual

10. See footnote 9 above.

11. The (major) independent group consists of the following:
(a) Non-salaried lawyers engaged in private practice as entrepreneurs with or without partners and who do not receive salaries for legal work performed;
(b) Law associates who receive legal salaries from independent law offices;
(c) Salaried lawyers who receive more than half their income from independent practice.
The (major) salaried group includes the following:
(a) The all-salaried lawyer who depends on a salary for his total income.
(b) The salaried lawyer who does some (less than half of his income) independent law work.
See footnote 2 in Liebenberg, *op. cit.*

12. See Segal and Fel, *op. cit.* For other earlier discussions on economics of the legal profession, see Garrison, *A Survey of the Wisconsin Bar*, 10 WISCONSIN LAW REVIEW 130 (February, 1935). Brown, *Lawyers and the Promotion of Justice* (1938); Garrison, *Is Bar Overcrowded?* 21 A.B.A.J. 264 (May, 1935); Segal, *Economics of Legal Profession in Massachusetts*, 23 BOSTON BAR BULLETIN 73 (March, 1952).

13. See Liebenberg, *op. cit.* For a detailed list of other legal indices used in one study, see Garrison, *A Survey of the Wisconsin Bar*, WISCONSIN LAW REVIEW (February, 1935), pages 145-146.

clientele. For lawyers receiving approximately $25,000 or more of gross income, the per cent of gross income from individuals declines to less than 50 per cent and in the group whose gross income is $75,000 and over, payments from individuals constitute only 14 per cent of the income. Today 67 per cent of lawyers report that they receive more than one half of their gross income from individuals compared to 71 per cent in 1947.

(b) *Sources of Legal Income*

The sources of income have a direct bearing on a lawyer's income. Lawyers working exclusively in salaried employment for private industry received, on the average, the highest income recorded with a mean of $13,770, which is $3,570 above the national average for all lawyers. A high relative position is also maintained by lawyers working for private industry with some income from independent sources. For those lawyers whose major source was outside the legal service industry, the lowest income was associated with government employment, for the civilian non-judicial government lawyer working only for a salary averaged $7,920, or $2300 below the national average for all lawyers in the United States. Judges fared well, for they average $11,620, or $1400 above the national average. Full-time teachers of law were over $1,000 below the national average, while teachers who did some independent legal work received slightly more than the national average for all lawyers in the country.

The average for the independent non-salaried lawyers was $10,258, while his counterpart who received some salary had a $400 higher average. The average legal salary for an associate in a law firm in 1954 was $7,786, or nearly $2500 below the national average for all lawyers. These figures contrast sharply with the average figures ($13,770) for lawyers who are salaried in private industry.

(c) *Size of Firm*

As expected, there is a marked positive relationship between the size of firm and the average income of lawyers. Lawyers in firms consisting of between five and eight members received on the average over three times as much net income before taxes as those in individual practice. Net earnings for lawyers in firms with nine or more members average $36,102 or almost five times the average income received by lawyers in solo practice. In fact the average net income increases markedly with the size of firm.[14]

(d) *Size of Community*

A similar positive relationship exists between the lawyers' incomes and size of communities. Income continues to mount from the lowest to the largest communities. Incomes of lawyers in communities of one million and more are over two times those reported for lawyers in communities of under 1,000 population. Lawyers practicing in communities of 100,000 to 250,000 received approximately the average legal income for the country as a whole.

In the smallest communities the average net income for the salaried group of lawyers tends to be larger than the income of independent practitioners. When a community size of 10,000-25,000 population is reached, the independent group receives, on the average, substantially higher incomes, but in the highest comunity size groups of one million or over, the difference decreases and almost the same income level is reached by the salaried group.

In the very large centers of population, the positive relationship between size and income breaks down and there is a greater spread among the incomes of the lawyers. This is particularly true for the group of independent lawyers. Except for Boston, most of the average incomes in the all-lawyer group are substantially larger than the national average, but San Francisco, the smallest of the eleven large cities surveyed, reported the highest mean income with $17,340 for independent lawyers and $13,160 for the group of all lawyers. The incomes of lawyers in the larger cities show nearly twice the spread found in the incomes of practitioners in cities with less than 250,000 people.

(e) *Location*

There are marked differences in income among the regions and states. The Middle East region has the highest average income for all lawyers, more than $1300 above the national average, while the Northwest (Colorado, Kansas and Nebraska) had the lowest average, only slightly above the Southeast region. At the same time, independent lawyers of the Far West had a higher average than their independent brethren in the Middle East. This change in rank points up the fact that the high average income for all lawyers in the Middle East is determined, to a large extent, by the high income reported by the major salaried group which yielded an average of $11,320 compared with $9,900 in the Far West.

Within regions, there is a relative homogeneity in average incomes. The five states included in the Middle Eastern group showed average incomes for the all-lawyer and independent groups in excess of the national averages. Similarly, all the states in the Southeast region, except for Louisiana, had incomes below that of the nation as a whole. In the Far West, Washington with a mean income of $8,850 was the only state substantially below the $11,460 regional average.

There is some relationship between regional per capita income and lawyers' income. The Middle East ranks first in average income per lawyer and second in per capita income. The Far West region ranks first in per capita income and second in average income for lawyers. New

14. See Smith, "The Cost of Legal Aid in a Metropolitan Area", published for the Survey of the Legal Profession by the American Bar Association's Committee on Legal Aid Work (1951); and *Legal Service Offices for Persons of Moderate Means*, WISCONSIN LAW REVIEW (May, 1949). The earlier studies on income by Weinfeld, op. cit. also bear out this conclusion.

England, however, ranks third in per capita income and fifth in lawyers' income.

By regions, there is also some relation between population and lawyer count. Whereas the Middle East ranks first in average income of lawyers, it also ranks first in lawyers' concentration. The Far West ranks second in lawyers' income but third in lawyer count per capita. New England ranks second in lawyer concentration and fifth in average income of lawyers.

Among the states, there are marked differences in lawyers' income. California had the highest mean income with $12,185 closely followed by Pennsylvania, Connecticut and New York. At the other extreme, there is Florida with a mean income of $7,830 closely followed by Kentucky and Tennessee.

In the independent group of lawyers, California with $13,465 ranks first, followed by Connecticut, Pennsylvania and New York. At the other extreme, independent lawyers in Iowa, Florida and Virginia have a mean average of only $8,000 to $8,500.

In the salaried lawyers, Illinois with $12,288, Pennsylvania with $12,245 and New York with $12,159 lead the list. In these states the salaried lawyers have a considerably higher average than the independent practitioners. The lowest salaried lawyer states are Kansas and Colorado with averages of only $6,800.

There seems to be some relationship between income per capita in the state and average income of lawyers. Connecticut which ranks first in income per capita ranks third in average income of lawyers. New York which ranks sixth in per capita income ranks fourth in average income of lawyers. Illinois ranks fifth in both categories while Tennessee ranks twenty-ninth in both groups. California ranks fourth in income per capita and first in average income of all lawyers. On the other hand, there are some wide discrepancies: Massachusetts ranks ninth in income per capita and twentieth in lawyers' income, the District of Columbia third and seventh, New Jersey second and eleventh, Pennsylvania twelfth and second, Louisiana twenth-sixth and sixth, and Washington eighth and twenty-second respectively.

The relationship between the ranking of average income of all lawyers and lawyers on a per capita basis is even slighter than with income per capita. Whereas Connecticut is third in lawyers' income, it is tenth in lawyers per capita. Massachusetts is twentieth and fifth, New Jersey eleventh and fourth, Pennsylvania second and twenty-ninth, Louisiana sixth and twenty-seventh, Virginia twenty-first and seventh, and California first and thirteenth respectively. At the same time New York ranks fourth in average income of lawyers and second in lawyers per capita, Tennessee twenty-ninth and twenty-eighth, Texas fifteenth and seventeenth and Illinois fifth and sixth respectively.[15]

(f) *Age*

A more definite association, however, does exist between age and income. Lawyers between 50 and 60 years of age show the highest average income, approximately $2600 above the national average. The lowest income is found in the group under 30 years of age. As age increases up to 60, average incomes of lawyers rise; thereafter there is some decrease in income with a sharp drop after 65 years of age. The salaried lawyer starts at a higher level and reaches his peak in the 50-55 level whereas the independent lawyer does not reach his peak until the 55-59 age bracket. After the age of peak income is reached, earnings decline at a substantially slower rate for the salaried than for the independent group of lawyers. As is true of other professions, the legal profession has a long period (between ages 45 to 64) of fairly stable earning power.

At the same time it should be recognized that there is a substantial spread of incomes at each age level. Even for the 55-59 age group of independent practitioners, who have the greatest income, we find approximately 30 per cent of lawyers receiving less than $5000 annually. Even in the middle year age brackets, approximately 30 per cent of the lawyers earn less than $5,000 per year. Marked increases in the percentages below $5,000 occur both in the early and very late years. The salaried group shows a similar wide spread of incomes at all age levels although the dispersion is markedly lower than that found for the independents. In general, the lower income dispersion among salaried lawyers is due to the fact that at each age level a smaller proportion of the salaried lawyers receive relatively low incomes.

There is also a positive relationship between age and relative income spread. The greater dispersion in income is found in the older group, emphasizing the fact that not all lawyers are equally successful in improving their earning power with years of practice, and that with advancing age some lawyers maintain or continue to improve their earning power while others tend to fall back to the $5,000 income levels of the young lawyers.

(g) *Years-in-Practice*

A further positive relationship exists between the number of years-in-practice and lawyers' income. The peak net income occurs for the 25 to 29 years in practice group and the lowest net income is found for lawyers with less than five years of practice. In fact at the peak, lawyers average more than twice what they earn during their first five years and almost twice what they earn during the first ten years of practice. The peak net income for salaried lawyers was in the 30-34 years-in-practice group while the major indepen-

15. For a fuller discussion of the factors affecting lawyers among the states, see articles cited in footnotes 2 and 9 above. As one study points out, "Broad economic factors are more important in their relationship to the number and incomes of lawyers than the familiar ratios of lawyers to population or the per capita wealth figures of the various states," Segal and Fei, op. cit.

dent lawyer reaches his peak in the 25-29 years-in-practice bracket, but during the first years of practice, there is a noticeably higher income among salaried lawyers than independent lawyers. In addition, the salaried lawyers' income does not fall as rapidly or steeply after reaching his peak as does the income of independent lawyers.

(h) *Part-time Practice*

Full-time lawyers fare better than the part-time lawyers, for, as we know, "the law is a jealous mistress". For all lawyers on a full-time basis, the average income was double that of the part-time lawyer. If we exclude the part-time lawyer from the calculations of all lawyers, the average is raised by $400. For the independent lawyers, the average income for full-time lawyers is nearly triple that of the part-time lawyer. In the salaried group, however, the part-time lawyer has a slightly better average than the average net income of the salaried lawyer doing full-time legal work. At the same time, there are a substantial number of part-time lawyers at almost all levels of net income. The proportion of part-time lawyers is largest at the lower levels of income, but a proportion (between 3 and 4 per cent) was found at all the high income levels with the exception of the $75,000 and over class. Consequently for a sizable number of lawyers, part-time practice is not associated with relatively low earnings.

In brief, these new data and studies on the legal service industry, the number and background of lawyers, and incomes of lawyers should help us to make a better approach to the many problems involved in the economics of the legal profession. They may aid the student about to embark on a law career, and they may also help the practicing attorney in a revaluation of his law business and office organization. They may make all of us as jealous of and faithful to the interests of our own profession as we are to the interests of our clients.

To paraphrase Sir Walter Scott, "A lawyer without an interest in his profession, including its economics, is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect and a contributor to a great profession".

The Case for the Individual Practitioner

(Continued from page 796)

titioner or a specialist, and regardless of whether he practices in the city or in the country. What we are interested in is his office organization, the opportunities it offers and disadvantages it involves.

The British barrister has long been regarded in legal circles as the paragon of the lawyer and advocate at his best. In England the great names of the legal profession have been those of the barristers. There the legal profession has for several centuries been divided into two branches, barristers and solicitors. Holdsworth has traced the history of this division for us.[24] The barrister presents the case to the court; the solicitor does the work of preparing it beforehand. "A practitioner in England must be *either* a barrister *or* a solicitor. He cannot be both."[25]

> It is an absolute rule of the bar that every barrister must work as an individual and not in a firm. He must be responsible for his own opinion; and this is the conception of his duties that remains with him to the last.[26]

The barristers have always been the elite of the British bar. Holdsworth, in tracing the historical development of the division in the British legal profession, tells us:

> . . . The difference between the class of work done by the barrister and that done by the attorney, led to the modern difference between the legal relations between them and their clients. . . . These differences had been becoming apparent all through the sixteenth century; and in the seventeenth century they had become quite obvious. So obvious had they become that, in 1614, it could be stated quite generally by the benchers of the four Inns that "There ought always to be preserved a difference between a counsellor at law, which is the principal person next unto the serjeants and judges in administration of justice, and attorneys and solicitors which are but ministerial persons and of an inferior nature."[27]

However, in the United States the distinction between barrister and solicitor has not been maintained.[28] Historically there were so few lawyers in the colonies that each had to do the jobs of both barristers and solicitors—and so they have continued down to today.[29]

The high standards which govern the British barrister have been developed over the centuries by custom—which is often stronger than a statute. One of these customs is that a barrister must never practice law as a partner.[30] He must be respon-

24. 6 Holdsworth, HISTORY OF ENGLISH LAW, Chapter VIII. See Denning, THE ROAD TO JUSTICE (London: Stevens & Sons Limited, 1955), page 62; Whitney, *Inside the English Courts*, 3 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 365 (1948), at pages 366-70.

25. Denning, THE ROAD TO JUSTICE, page 62.

26. Whitney, *Inside the English Courts*, 3 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1948) at 372.

27. 6 Holdsworth, HISTORY OF ENGLISH LAW, page 440. See Tweed, *The Changing Practice of Law*, 11 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 13, at 18 (January, 1956); Denning, THE ROAD TO JUSTICE, pages 62-63.

28. But see Gilbert, *A Joint Responsibility: Corporate Counsel and Retained Counsel*, 42 A.B.A.J. 715 (1956).

29. See Denning, THE ROAD TO JUSTICE, page 63. Lord Denning points out that, "Perhaps the greatest advantage of dividing the professions into two branches is that the number of barristers must then always be comparatively small: and this is a great help in maintaining standards and traditions built up over the centuries". *Ibid.*

30. Lord Chancellor Kilmuir to Eugene C. Gerhart, March 10, 1956. "The rule here that barristers cannot be in partnership is based, so far as I know, purely on custom and I do not think that it has ever been authoritatively reduced to writing. It is a question of the etiquette of the profession which has been the result of the way in which it developed, and of the personal relationship between the lay client and the barrister who speaks for him in Court." *Ibid.*

sible enirely for his own opinion, his own action and his own conduct. That is the concept of his profession which he carries with him as long as he practices at the Bar. It is easily understood, then, why it is that the judges of England's higher courts are picked from the ranks of the barristers. There is no doubt that the high ideals found among British barristers have an ineludible appeal to many American lawyers who also value independence of judgment and action and who are willing to assume the exhilarating albeit lonely responsibility of practicing law alone —like a barrister.

An Individual Practitioner . . . *Advantages to a Client*

What are the advantages to a client and his community from a lawyer's decision to be an individual practitioner? Many small communities cannot support a large law firm. Like the country doctor, the individual country lawyer has his essential place in our American society.[31] A small town individual practitioner is automatically selected and regarded as a leader in his comunity's affairs. He can practice law without the huge overhead of metropolitan firms and therefore brings necessary legal service to smaller communities at a price his clients can afford to pay. Nor is such service or advice of a poorer quality merely because the price is lower. With a lower office overhead the individual practitioner can practice law on a more economical basis and therefore at lower cost to his community. It is a distinct advantage to a client to have his affairs handled under the direction of a single individual. Efficiency results where one lawyer has complete control of a client's case.

There is another outstanding advantage to the community in having independent individual practitioners among its lawyers. Independent practitioners are usually beholden to no man. They have few permanent friends and few permanent enemies. They are a stubborn breed in the sense that they stubbornly refuse to surrender their independence to either their clients, the courts or to their fellow lawyers. They know that as much legal justice is meted out in law offices as is ever dispensed by judges from the Bench. They know the incomparable value of being able to exercise independent judgment, to make independent decisions and, most important of all, of being able to take independent action. They respect the old father's advice to his country lawyer son: "Keep always in the position where you have a right to, and can, tell any man to go to Hell!" That profane advice is at the heart of the love of independence which characterizes the individual practitioner.

Not only does the individual practitioner have the advantage of complete independence of action and of decision, but he also has sole and final responsibility for his decisions and for his actions. The victories are sweeter to him; the defeats he can blame on no one but himself. He has complete freedom of choice of the clients he will serve and the cases he will take. There are no conflicts of interest between him and his partners. He can take unpopular cases which he thinks are right without the reproving cautions of other partners admonishing him to step out. An individual practitioner's life is a free man's life—perhaps that is one reason two lawyers in America out of three have chosen that path in the law.

In his own office the individual practitioner has a chance to develop his individualism to the utmost of his potentialities. We talk much of developing specialists today, but more and more we need general executives. The higher we go in the line of authority whether in law, in business or in politics, the more general abilities are needed. To gain the experience necessary to develop such general abilities there is no more natural place than a small general business.[32] In the case of a lawyer, his small general business is his own private office.

One of the prime evidences of an educated man is his capacity for growth. An expert in the field of education said this:

> Broadened views, widened sympathies, deepened insights are the accompaniments of growth. For this growth a many-sided interest is necessary, and this is why growth and intellectual and moral narrowness are eternally at war. There is much in our modern education which is uneducational because it makes growth difficult, if not impossible. Early specialization, with its attendant limited range both of information and of interest, is an enemy of growth. Turning from the distasteful before it is understood is an enemy of growth. Failure to see the relation of the subject of one's special interest to other subjects is an enemy of growth.[33]

It is small wonder that it is from the ranks of our general practitioners that America has largely drawn her great statesmen of the past. Such men see life and the law as a whole, not just a segment of it as a specialty. The broader a man's experience, the better his judgment should be. Many such men become what we call "lawyer's lawyers". These individual practitioners, whether they be located in the city or the country, are not content to work only seven hours a day, five days a week. Their love for the law is such that they want—passionately—to utilize to the maximum the talents and energies the Lord gave them. Such are the breed of law men who have built the foundations and structure of our liberties.

An Individual Practitioner . . . *Advantages to the Law*

There are also advantages to our profession as a whole in having a large number of individual practitioners included in its membership. The law by its very nature is a contentious profession. The independent individual practitioner, whose

31. No one has paid a finer tribute to the country lawyer than the late Supreme Court Justice Robert H. Jackson, himself a self-styled "country lawyer". See his *Tribute to Country Lawyers*, 30 A.B.A.J. 136 (1944).

32. Barnard, Organization and Management (Cambridge: Harvard University Press, 1949), pages 88 and 165. See The Executive Life, by the Editors of Fortune (New York: Doubleday and Company, Inc., 1956), pages 74-75.

33. Nicholas Murray Butler, *Five Evidences of an Education*, reprinted in 6 Modern Eloquence (New York: Modern Eloquence Corporation, 1923), page 66. See Lundberg, *The Law Factories*, 179 Harper's Magazine 180 (1939), at pages 181-83 and 187-88; and Whyte, The Organization Man (New York: Simon & Schuster, 1956).

voice is neither controlled by nor subservient to any particular client or group of clients acts as a spokesman for various points of view. Among the qualities of the great lawyer is the one that requires that he be a leader in his professional activities. The development of the quality of independent thought and action in individual practice is reflected in the independent action of the local, state and national bar associations across America.

Another great advantage of individual practice is the excellent material it provides for appointments to the Bench. This is recognized to a greater extent in England than in America where, whether we like it or not, politics still plays the leading role in the appointments to judicial office. In England the judges of the higher courts are appointed from the ranks of the barristers who are individual practitioners.[34] Their experience is wider, their judgment presumably better, because not narrowed by specialization. Such is the high regard for the law in England that judicial appointments are made by the selection of the best man available—regardless of political party.

It must be readily admitted that many individual practitioners fall far short of the standards applied to the select group of barristers in England. A man like John W. Davis, although himself a former partner in a large New York City law firm, was properly described as an independent American barrister.[35]

It is not without justification that the British barrister is widely regarded as the lawyer at his best. It is highly significant that the customs and traditions of his class require that he practice alone. In the United States the individual practitioner is the closest analogy we have to the British barrister.

V. *Disadvantages of Individual Practice*

For every advantage there is some compensating disadvantage. Individual practice is no exception. There are some disadvantages in practicing law as an individual practitioner, rather than as a member of a firm. In the first place, the individual lawyer's success depends solely upon himself. What is his education? His training? His background? His native ability? Does he have the desire to work and to work hard? Does he have that absolute, incessant, undying tenacity of purpose, that persistence and thoroughness which are rightly regarded as the prime ingredients of success? What financial resources does he have? Are they sufficient to carry him over the lean years when he starts out on his own? What are his personal qualities? Is he the kind of man who can, like the contact partner of a large firm, attract clients and then hold them by the qualities of his character and his work? The answers to these questions are vital in determining whether a man is justified in going it alone.[36]

Time is the measure of all things. Pictures—exaggerated to be sure—are often painted of the harassed individual practitioner who is swamped by his daily schedule.[37] It is imperative that the individual practitioner master his time. Unless he can do that he will be the victim of every new demand on his time with the result that, while he will always appear busy, overworked and under tension, he will not be accomplishing the things that he should—and could—if he mastered his time.

No competent individual practitioner will overlook the modern mechanical equipment which enables him to multiply his output and conserve his time and energy. He investigates the advantages of many new and efficient types of dictating equipment, photocopying machines, microfilmed law books, numerous loose-leaf services, telephone improvements and newsletter services to keep him abreast of the latest developments in the law.

An individual practitioner must lay out his trial schedule so that it does not interfere with conferences with clients and his other office work which he must also keep up to date. He also is faced with the problem of planning his vacation period so as to interfere least with his office routine. Here is where a good junior or associate and a well-trained office staff are real assets. Illness is also a problem to an individual practitioner so he must constantly watch his health habits. Extended absence from his office creates problems for him because they make him less available to his clients. These are

34. See, *e.g.*, Vanderbilt, THE CHALLENGE TO LAW REFORM (Princeton: Princeton University Press, 1955), pages 13 and 28; Lord Chancellor Jowitt's address in Cleveland, 33 A.B.A.J. 1177 (1947), at page 1180.

35. See II Swaine, THE CRAVATH FIRM, page 462; Mayer, *The Wall Street Lawyers, The Elite Corps of American Business*, Part I. 212 HARPER'S MAGAZINE 31 (January, 1956), at page 36; 3 FORTUNE MAGAZINE 64 (1931).

36. Cox, THE ADVOCATE (London: John Crockford, 1852), Chapters III, IV and V.

37. See *e.g.*, Redden, CAREER PLANNING IN THE LAW, page 23.

problems he must face squarely and solve realistically. They are the price of that independence which is the sweet reward of individual practice. The fact that British barristers and successful American "barristers" solve these problems means that they *can* be solved satisfactorily. It takes a good lawyer to do it—but after all, one of the ideals of the individual practitioner is to be a top-notch lawyer![38]

VI. *The Choice*

"You can not argue a man into liking a glass of beer", observed the sage Mr. Justice Holmes. Neither can you argue a man who values independence more than security into enjoying partnership practice, or vice versa. The choice is a personal one. Like other personal choices in life, it must be made by each individual based upon his desires, his tastes, his ambitions and his estimates of his own abilities and character. Some lawyers believe that independence of judgment and action are the most desirable attributes of a law practice. Others believe that the apparent security, the efficiency and the greater wealth which may be gained from firm practice have more value for them. Each may be right from his own standpoint. Still another lawyer may feel that his niche is acting as house counsel for a large company. If he takes such a position, who can rightfully charge that he is "wrong"? He is only wrong if he takes the house counsel's position and then expects to enjoy the prime values of independent individual practice. Once a man makes his choice, he can not expect to find in his chosen field the advantages which he gave up in the field he rejected. Whether you choose to be an individual practitioner, a house counsel, an associate of other lawyers, or a partner in a firm in a metropolitan area, is entirely up to you.

One important point we should not overlook. In a large firm or in an individual office, law finally is practiced in much the same fashion in one respect. In the largest firms in the country there is a responsible partner who is in charge of the case.[39] Under the responsible partner there are usually one or more associates who are assigned to that case. There will also be one or more law clerks working with him. They are the law "team". But the man in charge is the responsible partner. He, however, is responsible to his firm and to his other partners for the management he gives that case. In an individual practitioner's office we can find the same team duplicated, except, of course, in the case where a man practices without a law clerk or an associate lawyer. The individual practitioner is responsible only to his client for the handling of the case. There is no firm to veto his decisions along the way, no firm to share the glory of his victory, no firm to comfort him in the black hours of defeat. The laurels and the ashes are his own.

There is something thrilling in being on your own! Holmes knew it: "Only when you have worked alone,—when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and in despair have trusted to your own unshaken will,—then only will you have achieved."[40] Whether a man be trying a case, or arguing an appeal, he must finally stand up on his own two hind legs and speak for his client—alone. Justice Jackson put it this way:

> When he rises to speak at the bar, the advocate stands intellectually naked and alone. Habits of thought and speech cannot be borrowed like garments for the event. What an advocate gives to a case is himself; he can bring to the bar only what is within him. A part written for him will never be convincing.[41]

The attraction of individual practice is still strong in America. Two out of every three American lawyers practice that way. These men believe that the individual still counts for something; that the best way for the individual to develop his potentialities to the full is to do it on his own. They realize that despite its vaunted merits, specialization is a cramping, restricting thing which does not usually develop a well-rounded lawyer. A lawyer who likes to make his own decisions, who enjoys meeting and solving his own problems, will always hesitate before he turns over his independence and his free life to any other man or group of men. The country lawyer, watching the trees grow on the friendly hills around him, has learned that a tree, like other living things, will fail to attain the full perfection of its potentially perfect symmetry if it is too crowded by its neighbors. A tree, whether it be a giant redwood or just a sturdy little oak, only attains its full growth when it stands alone. The analogy holds true for the lawyer. That is why individual practitioners find their happiness in the law going it alone. They understand Mr. Justice Holmes when he said:

> And happiness, I am sure from hav-

38. See Vanderbilt, *The Five Functions of the Lawyer: Service to Clients and the Public*, 40 A.B.A.J. 31 (1954); Gerhart, *The Compleat Counsellor: The Ideal of the Fully Accomplished Lawyer*, 35 A.B.A.J. 975 (1949).

39. Mayer, *Keepers of the Business Conscience: The Wall Street Lawyers*, Part II. 212 HARPER'S MAGAZINE 50 (1956), at page 53; Siddall, *Specialization in the Law: A Retort to Professor Joiner's Call for Control*, 42 A.B.A.J. 625 (1956) at 627; Lundberg, *The Law Factories*, 179 HARPER'S MAGAZINE 180 (1939) at pages 181-82. Siddall, A SURVEY OF LARGE LAW FIRMS IN THE UNITED STATES (privately printed) (New York: Vantage Press, Inc.)

40. Holmes, *The Profession of the Law*, in SPEECHES (Boston: Little, Brown and Company, 1934) 22, at page 24.

41. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A.J. 801 (1951) at page 863.

ing known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success.[42]

In the modern world with its emphasis on concentration and specialization, it is refreshing to see that in the legal profession there is still a large body of men who believe with Kipling that, "He travels the fastest who travels alone."[43] The ultimate purpose of specialization is efficiency, a goal not attained in fact by every law firm. The result of individual practice can be—and generally is—the development of a self-reliant, courageous, well-rounded lawyer, responsible for his own judgment, decisions and action. So long as our profession puts high value on those great qualities of a man and a lawyer, so long will there be a need and a place for the individual practitioner. So let us conclude with a poetic toast[44] to those men of the law who are going it alone:

There's something, no doubt, in the hand you may hold;
Health, family, culture, wit, beauty, and gold
The fortunate owner may fairly regard
As, each in its way, a most excellent card;
Yet the game may be lost, with all these for your own,
Unless you've the courage to go it alone!
In battle or business, whatever the game,
In law or in love, it is ever the same;
In the struggle for power, or the scramble for pelf,
Let this be your motto—Rely on yourself!
For, whether the prize be a ribbon or throne,
The victor is he who can go it alone!

42. Holmes, *The Path of the Law*, in COLLECTED LEGAL PAPERS (New York: Harcourt, Brace and Company, 1921), at page 202.
43. From Kipling's poem, "The Winners".
44. From John Godfrey Saxe's poem, "The Game of Life".

The President's Annual Address

(Continued from page 788)

ing. While much of the work of grievance committees is confidential, and, therefore, no accurate information is available as to the total disciplinary work being done by the bar associations of this country, an examination of the reports of the grievance committees of any of the major associations will show that they are continually engaged in the examination and prosecution of complaints against lawyers for professional misconduct. And a survey of the reported opinions of the courts will quickly demonstrate that the disciplinary process results in effective action against wrongdoers in a substantial volume. For example, reported decisions of the New York Courts, Appellate Division, during the past year dealt with five disbarments, two suspensions, and one censure. Decisions of courts in other states indicate about the same level of activity in proportion to the number of lawyers in the jurisdiction.

The grounds for disciplinary action in these cases decided within the past year include the following: commingling and conversion of clients' funds; issuing bad checks; giving of false testimony; neglect in prosecuting clients' claims; excessive fees; solicitation of claims and advancing funds to clients; filing of false and fraudulent income tax returns; improper administration of estates; representation of conflicting interests; filing fictitious claims and false instruments; participation in defrauding of client's creditors; abuse of client's confidence to attorney's personal profit; subornation of perjury; and conviction for a felony involving moral turpitude such as larceny and embezzlement.

The impression which is given by a reading of these decisions and an examination of reports of grievance committees is one of considerable activity in all the various areas of law practice to maintain proper standards of conduct. It also appears that the level of disciplinary activity varies from jurisdiction to jurisdiction and the bar associations of all states would be well advised to re-examine their own program.

Another impression which these decisions give is that, with considerable consistency and uniformity, the courts tend to reduce the sanction recommended by the bar association committee in the preliminary hearings. An examination of this tendency in one field may provide a useful illustration of the difficulties faced by the Bar in carrying out a rigorous disciplinary program. It is appropriate to take for that purpose the problem of solicitation of personal injury claims because it provides some good examples and because it was the subject of the lead article in the March 23, 1957, issue of the *Saturday Evening Post*, entitled "How an Ambulance Chaser Works".

This type of misconduct is clearly defined and forbidden by the Canons of Ethics. There can be no question that this prohibition is known to all courts and lawyers, and the resulting harm is widely recognized. Significantly, the only Canon which requires the offender to be disbarred is Canon 28 which reads as follows:

> It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up de-

fects in titles, or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred.

Two Solicitation Cases . . . *Attorney Discipline*

During the past year, three decisions of the Illinois Supreme Court have been concerned with the discipline of attorneys involved in the solicitation of personal injury cases. In one, *In re Moore*, the Board of Governors of the Illinois State Bar Association recommended suspension for one year, but the court found that the attorney's conduct warranted only censure. In another, *In re Cohn*, the Illinois State Bar Association's Board of Governors recommended suspension for five years. In that case the attorney admitted that he had engaged in improper solicitation through an employed agent for several years and that he understood the unethical nature of solicitation. The Court recognized the validity of the Canon in the following language:

> The practice of solicitation, as exemplified in this case, is one of the most serious problems confronting the profession. It is condemned by the canons of ethics of every bar association, and yet some lawyers persistently engage in such improper conduct, bringing the entire profession into disrepute. The evils of so-called "ambulance chasing" are well known, and have been made the object of repeated criticism in our court and elsewhere.

Yet, because the attorney admitted his mistake and promised not to engage further in such practices and was otherwise of good reputation, the Court, with one dissent, held that he deserved only a severe reprimand and censure. In a concurring opinion one justice expressed a point of view which may explain the difficulties confronting bar associations in attempting to eradicate ambulance-chasing. Mr. Justice Bristow described the activities of the soliciting lawyer in the face of activities by defendant claims adjusters and agents as follows:

> The net result of the timely arrival of the solicitor is that the claimant will eventually receive an amount that a court and jury deem adequate and just. This presupposes that the case is placed in the hands of proven ability and unquestioned fidelity. The uncontradicted proof in this record demonstrates that respondent was such a person. Apart from the good, the only tangible harm that evolved from the solicitation in the instant case is that suffered by the St. Louis barrister who had a portion of his business sidetracked. I am not overlooking the impact of this ugly practice on our fine profession. Nevertheless, solicitation of personal injury cases is the natural reflex or defensive response to the unfair methods of claim adjusters, just as naturally as the human organism elaborates its own antibodies to combat disease.

There is no question but that the practices of some corporate claim agents are inimical to the public interest and should be banned. But that hardly justifies a like wrong being committed by lawyers. Furthermore if Justice Bristow's point of view is to be adopted, ethical lawyers could be penalized for conforming to the Canons of Ethics. Does he mean to imply that Canon 28 should be repealed to put all lawyers (good and bad) on an equal footing. This would reduce the profession to the necessity of bidding for practice in the common market place which would be a sorry day for lawyers as well as the public. No, I think it is clear that our course lies in strict enforcement of the Canons. And effective enforcement depends on the courts as Justice Schaefer says in his dissent to the *Cohn* decision:

> Censure misses the mark in a case like this one. Respondent deliberately and systematically solicited business to make money. He succeeded. If we assume that censure will keep him from resuming operations, there are others who might be quite willing to choose a certain and substantial present profit against the risk that if their activities are discovered the consequence will be a formal censure buried in the reports of this court.

An examination of cases in other states indicates that there is a widespread reluctance on the part of the courts to apply severe sanctions to this type of professional misconduct. Examples can be found in Tennessee, Ohio and Minnesota. The views of the apparent minority on the courts who favor more severe punishment for such misconduct find expression in an unusually interesting dissenting opinion by Justice William Brennan, then a member of the Supreme Court of New Jersey, in the case of *In re Frankel*. The whole court agreed that the evidence showed that the accused attorney had been engaging in organized solicitation of personal injury claims through a representative over a period of several years. However, a disagreement arose within the court as

to the appropriate discipline in the case. Mr. Justice Brennan described the nature of disciplinary proceedings and their fundamental importance to the profession and to society.

> The true purpose and function of disciplinary proceedings must ever be kept uppermost in mind. Discipline is not imposed to punish the lawyer who transgresses. It is imposed in order that the public shall have continued confidence that the profession will purge itself of lawyers unable or unwilling to measure up to the high standards of honor and moral decency by which we govern our professional conduct—and that we will do so, not to enhance our own self-esteem, but solely to further the end that public respect for the purity of the administration of justice shall not waver or diminish. That respect is a first essential of a democracy; the confidence of the people in the administration of justice is a prime requisite for free representative government. It would be tragic indeed if that confidence and respect should be lost out of public suspicion, be it ever so slight, that the profession cannot be counted upon courageously to rid its ranks of those who by their serious misconduct demonstrate their contempt for the professional ideals which earn that respect and confidence for us.

He then characterizes the offense as "of a most grievous nature, wholly inimical to the public interest", and because of the feature of the contingent arrangement, not only, as said by the majority, "classed by the canon itself as one justifying disbarment", but one for which other states have had little hesitancy in decreeing disbarment. Mr. Justice Brennan points out that the offense of ambulance chasing has been one which has continually plagued the profession and has been the cause of repeated investigations by bar associations and courts into the causes and solution to this problem. He refers to a Special Committee on Abuses in Accident Litigation of the American Bar Association in 1929 and similar studies in the states of New York, Pennsylvania and Wisconsin at about the same time. These investigations led to the adoption of rules of court and statutes in some states which have tried to implement the rules against such practices. However, experience in the last twenty-five years indicates that the remedies do not dispose of the problem and it remains with us in probably a more acute form because more highly organized and commercialized.

While it may not be certain that strict enforcement of the Canons by the courts in support of bar association efforts to discipline members of the profession engaged in ambulance chasing will eradicate this evil, it does seem clear that the lack of effective co-operation by the courts with the bar associations in this field has made it difficult if not impossible to eliminate the practice which all agree is improper. It is to be hoped that the report of our Special Committee on Investigation, Solicitation and Handling of Personal Injury Claims will point up the necessity of strict enforcement.

In conclusion may I emphasize that the legal profession is an integral part of a free democratic society. It is our job to preserve the profession in its traditional independent status in order that it may properly carry out its work. One of the common attributes of a profession is that it is made up of an organized group of individuals possessed of the same skills and training and devoted to the same aim of serving the public interest. Without organization, the profession would disappear and with it the independence of its individual members and the traditional skills and knowledge which are its special province. Through organization the lawyers are able to control their own training and standards and in that way preserve the essence of the roles they perform in the public interest. Also, through organization the profession is able to discipline itself and to maintain, self-consciously, standards of conduct which are necessary to the preservation of the lawyers' proper balance between the sometimes conflicting claims of client, the courts and the public interest. Without a well organized militant Bar, standards of legal education, qualifications for admission, discipline and ethical requirements could well be taken over by agencies outside the profession and thereby cost lawyers their independence and would prevent them from performing their traditional functions in our legal system. It seems clear to me that lawyers cannot look to the solution of their disciplinary problems from outside the profession, but must develop more effective means of self-discipline. To a great extent the strengthening of bar associations has strengthened this disciplinary process, as can be seen by comparing the disciplinary programs of states with integrated Bars with the non-integrated states. However, as long as the power to disbar resides ultimately in the highest court of the state—and the American Bar Association is on record as stating that that is the proper place for it—the disciplinary program must depend upon close co-operation between the courts and the bar associations. In practice, this means at the present time that the courts must direct their attention to the importance of strengthening the Bar's efforts to maintain proper standards of conduct through their greater willingness to give proper weight to the public interest in disciplinary proceedings as opposed to the interest of the individual lawyer accused of misconduct.

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ATLANTA, GEORGIA	February 19, 1958
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PITTSBURGH, PENNSYLVANIA	March, 1959
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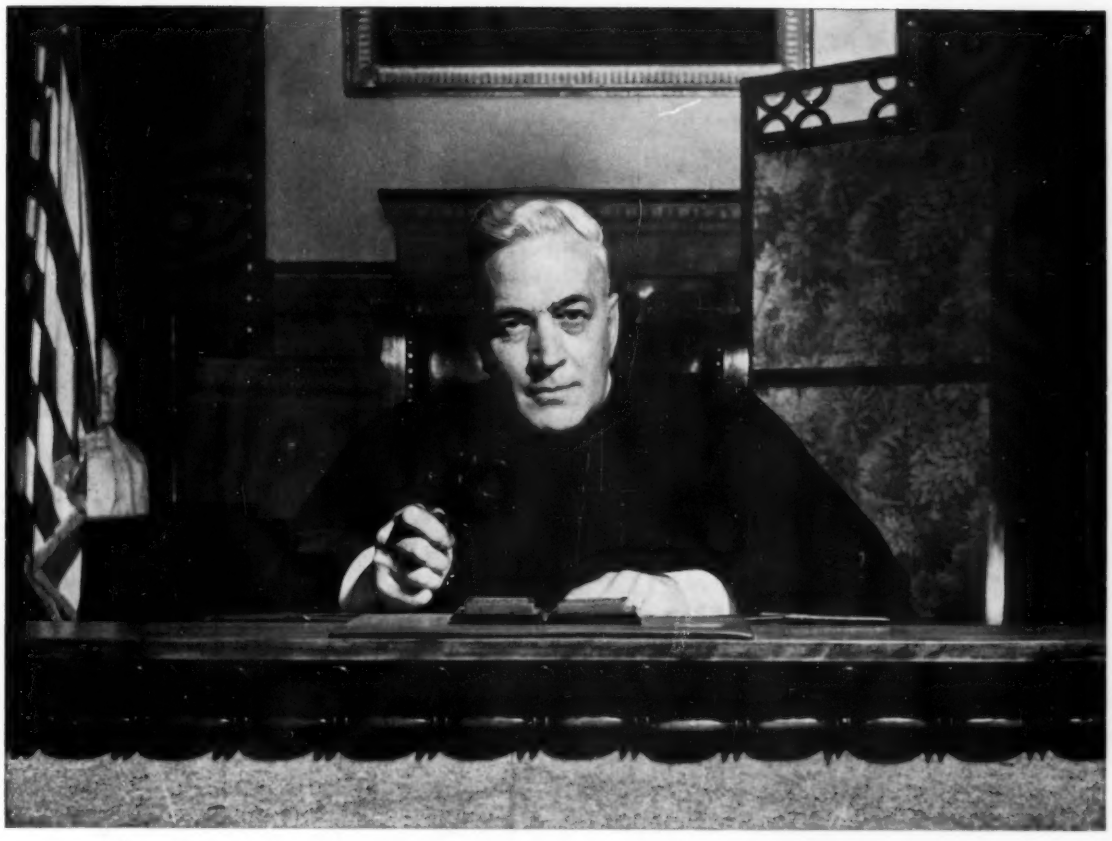

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